Supreme Court, U.S.
FILED
JUN 27 2003

No. 03 - 24

In the Supreme Court of the United States

TAUNI SIMO, ET AL.,
Petitioners,

v.

UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES, SOUTHWEST DISTRICT COUNCIL, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LINDA S. KLIBANOW
Counsel of Record

LAW OFFICES OF LINDA S. KLIBANOW
225 SOUTH LAKE AVENUE, SUITE 300
PASADENA, CA 91101
(626) 432-5479

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

199 pp
2 $/p

QUESTIONS PRESENTED FOR REVIEW

1. Where an exclusive bargaining representative pressures the supplier of the represented unit to cut off work supply to the unit, expressly to obtain leverage in bargaining negotiations with the employer in that represented unit, does such pressure comprise representational activity for purposes of the duty of fair representation ["DFR"]?

2. Are workers deprived of constitutional liberty and property interests when they are required to fund union activities deemed "representational" for purposes of ascertaining "fair share fees" under Communications Workers of America v. Beck, 487 U.S. 735 (1988), yet not deemed "representational" for purposes of DFR liability?

3. Do the garment industry provisos to Section 8 of the National Labor Relations Act ("NLRA") immunize a garment industry union from liability for breach of the DFR arising out of the union's pressuring a supplier to cease supplying work to a represented unit, even when the union's motivation is to retaliate against the efforts of a majority of unit employees to decertify the union?

4. In the case of an integrated production structure such as occurs within the garment industry, in ruling upon a claim of breach of the DFR arising out of a union's alleged retaliatory efforts to shut down a *component unit* in which a majority of workers sought union decertification (and brought civil suit for breach of the DFR arising out of such retaliation), must the Court's discrimination analysis entail comparison of treatment *among represented units*, rather than limit its analysis to comparison of workers within the single unit in which decertification efforts occurred?

5. Does a union breach the DFR when it conditions a collective bargaining agreement ("CBA") (and consequent resumption of interrupted work supply) upon dismissal of represented employees' civil suit against the union for breach of the DFR?

6. On summary judgment motion, does a union escape liability for breach of the DFR arising out of its removal of work supply in retaliation for employee decertification efforts and/or refusal to reach a CBA (enabling resumption of work supply absent dismissal of employees' DFR suit), based solely upon disputed "claims" that the employer was "somehow involved" in the employees' decertification efforts and/or their DFR suit?

7. Must summary judgment be denied where union-represented employees in a DFR action raise triable issue that retaliation for exercise of NLRA Section 7 rights was a motivating factor behind a union's actions adverse to their employment opportunities, even where there is triable issue that other factors may also have motivated the adverse action? In other words, does this Court's "mixed motive" holding in Desert Palace, Inc. v. Costa, [2003 U.S. LEXIS 4422 (2003)] apply to a DFR invidious discrimination claim?

8. Where garment workers sue their union for breaching the DFR by removing work supply in retaliation for employee decertification efforts (resulting in bankruptcy and closure of the employer), and the district court rejects the union's contention that the garment industry proviso(s) immunize it from DFR liability arising out of secondary conduct regardless of retaliatory motivation, do the public good arising out of such holding, the "civil rights" nature of the issues, and the tremendous economic disparity between Respondent union and Petitioners, mandate denial of

substantial costs against Petitioner garment workers since such award will create a "chilling effect" denying workers realistic judicial recourse for DFR cases raising constitutional and civil rights issues, and thereby promote abuse of unchecked power by unions?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Petitioners. The Petitioners are 25 garment workers formerly employed by Sorrento Coats, Inc., an outerwear manufacturer which operated in San Bernardino, California for in excess of 25 years prior to its bankruptcy and closure in December 1998.[1]

Respondents. The Respondents are Union of Needletrades, Industrial & Textile Employees, AFL-CIO ("UNITE"), the Union of Needletrades, Industrial & Textile Employees, Southwest District Council, Steve Nutter, International Vice President, UNITE, Antonio Orea, President of UNITE, Southwest District Council, and Roxana Guevara, Business Agent of UNITE, Southwest District Council, during the time in question.[2]

---

[1] Petitioners' years of employment, and primary occupations at Sorrento prior to its closure are as follows: Tauni Simo:11 years, trimmer; Dalores Rowe: 23 years, liner; Maria Ramirez: 16 years, Presser; Petra Villegas: 16 years, Presser; Petra DeLeon: 23 years, Machine Operator; Candy Fernandez: 23 years, Sewing; Gabriela Uribe: 7 years, Sewing Machine Operator, Sewing Operator; Angelina Perez: 8 years, Distribute work; Maria Clark: 8 years, Ironing; Lourdes Gonzales: 17 years, Ironer; Vilma Garcia: 8 years, Ironer; Dolores Olivas: 18 years, Marker; Maria Osorio:3 years, Sewing Operator; Silvie Madrigal: 6 years, Inspector; Ana Gonzales: 26 years, button, blind stitch, tacking, turning, cutting; Maria Aguirre: 16 years, Glue Liner; Marina Godina: 15 years, Presser; Lidia Peraza: 6 years, Seamstress; Chong Suk Kim: 16 years, Seamstress; Claristine Hadley: 13 years, Facing Setter; Yong Hui Pak: 16 years, Makes Pockets–; Teresa Gomez; 22 years, Seamstress month, Sew collars; Noemia Maya: 16 years, Presser; Teresa Wilson Sloan: 15 years, Seamstress; Miyako Kanai: 13 years, Inspector.

[2] UNITE is the product of a 1995 merger between the International Ladies Garment Workers Union ("ILGWU") and the Amalgamated Clothing and Textile Workers Union ("ACTWU"). Before the Court of

TABLE OF CONTENTS

Questions Presented i

List of Parties to the Proceeding in the Court Below . . . iv

Table of Contents v

Table of Authorities ix

Petition for Writ of Certiorari 1

Opinions Below 1

Statement of Jurisdiction 3

Constitutional and Statutory Provisions Involved 3

Statement of the Case and Facts 4

A. Case History 4

B. Statement Facts 5

Reasons for Granting the Writ 11

Appeals UNITE conceded that, due to its actions in concert with the Southwest District Council with respect to collective bargaining negotiations with Sorrento Coats, including its secondary pressure of withholding work supply, a finding of triable issue as to breach of DFR against Southwest District Council would also comprise a finding of triable issue as to UNITE.

I. TIME IS RIPE FOR THIS COURT TO CLARIFY, AND RECONCILE, THE LEGAL TERM OF ART, "REPRESENTATIONAL CONDUCT," FOR PURPOSES OF DFR AND FAIR SHARE 11

II. THE COURT OF APPEALS APPLIED A FAULTY "PROOF MATRIX" REFLECTIVE OF ITS MISAPPREHENSION OF DFR OBLIGATIONS . . 20

III. THIS COURT SHOULD GUIDE THE JUDICIARY WITH RESPECT TO CONSIDERATION OF THE FOLLOWING FACTORS IN "FIRST IMPRESSION" SECTION 7 DFR LITIGATION: (1) THE "CLOSE" AND "COMPLEX" FACTORS; (2) THE "PUBLIC BENEFIT" FACTOR; AND (3) THE GROSS ECONOMIC DISPARITY BETWEEN LARGE INSTITUTIONAL UNIONS AND INDIVIDUAL LITIGANTS AND RELATED "CHILLING EFFECT" UPON INDIVIDUAL WORKER SECTION 7 DFR LITIGANTS 24

IV. CONCLUSION 27

Appendix

Appendix A
Ninth Circuit Court of Appeals Order and Amended Opinion Filed January 16, 2003, Amended March 6, 2003 . . . . . 1a

Appendix B
United States District Court for the Central District of California Western Division Opinion Dated August 20, 2001 . . . . . 45a

Appendix C
Ninth Circuit Court of Appeals Memorandum Dated January 16, 2003 . . . . . 88a

Appendix D
United States District Court for the Central District of California Western Division Minute Order Dated March 20, 2002 . . . . . 92a

Appendix E
United States District Court for the Central District of California Western Division Order Dated May 14, 1999 . . . . . 97a

Appendix F
United States District Court for the Central District of California Local Rule 4.2.2 Notification 109a

Appendix G
United States Government National Labor Relations Board Petition No. 31-RD-1373 Filed August 22, 1997 (See Fold Out Exhibit) 115a

Appendix H
United States of America Before the National Labor Relations Board Region 31 No. 31-CA-22699 NLRB Order Denying Motion to Intervene Dated November 4, 1997 . . . . . 118a

Appendix I
United States Government National Labor Relations Board Region 31 Decision Dated December 11, 1998 . . . . . 120a

Appendix J
United States Government National Labor RelationsLetter Denying Request for Review Dated March 3, 1998 . . . . . 125a

Appendix K
United States Government National Labor Relations Board Petition No. 31-RD-1393 Filed August 26, 1998 (See Fold Out Exhibit) 126a

Appendix L
United States of America Before the National Labor Relations Board Cases Nos. 31-CA-22699, 22991 and 23064 NLRB Decision and Order Dated September 16, 1998 . . . . . 127a

Appendix M
United States of America Before the National Labor Relations Board Region 31 No. 31-RD-1393 NLRB Decision Dated December 11, 1998 . . . . . 136a

Appendix N
Constitutional Provisions, Statutes, and Rules . . . 144a

Appendix O
E-mails from Professor Clyde Summers 153a

TABLE OF AUTHORITIES

CASES

Aguinaga v. UFCW,
993 F.2d 1463 (10th Cir. 1993) 17

Airline Pilots Ass'n., Int'l. v. O'Neill,
499 U.S. 65 (1991) 12

Association of Mexican-American Educators v. State of California,
231 F.3d 572 (9th Cir. 2000) 24

Braxton v. UPS,
148 F.R.D. 527 (E.D. Pa. 1993) 27

Breininger v. Sheet Metal Workers International Association,
493 U.S. 67 (1989) 12, 17

Caterair International v. NLRB,
22 F.3d 1114 (D.C. Cir. 1994),
cert. den. 513 U.S. 1015 18

Communications Workers of America v. Beck,
487 U.S. 735 (1989) . . . . . i, 12

DelCostello v. IBT,
462 U.S. 151, 76 L.Ed.2d 476,
103 S.Ct. 2281 (1983) 17

Desert Palace, Inc. v. Costa,
2003 U.S. LEXIS 4422 (2003) . . . . . ii, 23, 24, 28

Felice v. Sever,
985 F.2d 1221 (3rd Cir. 1993) 20

Hensley v. Eckerhart,
461 U.S. 424 (1983) 26

Hines v. Anchor Motor Freight, Inc.,
424 U.S. 554 (1976) 12, 29

Karo v. San Diego Symphony Orch. Assn.,
762 F.2d 819 (9th Cir. 1985) 20

Kinslow v. American Postal Workers Union,
222 F.3d 269 (7th Cir. 2000) 26

Kolinske v. Lubbers
712 F.2d 471 (D.C. Cir. 1983) 20

Lehnert v. Ferris Faculty Association,
500 U.S. 507 (1991) 11, 12, 13, 16

Lewis v. Tuscan Dairy Farms,
25 F.3d 1138 (2nd Cir. 1994) 17

Mulvihill v. Spalding Worldwide Sports, Inc.,
239 F.Supp.2d 121 (D. Mass. 2002) 24

NLRB v. Insurance Agents Int'l. U.,
361 U.S. 477 (1960) 14

NLRB v. Local 54,
887 F2d 28 (3rd Cir. 1989) 15, 21

NLRB v. Wismer & Becker,
603 F.2d 1383 (9th Cir., 1979) 21

Pattern Makers League v. NLRB,
473 U.S. 95 (1985) 15

Radio Officers Union v. NLRB,
347 U.S. 17 (1954) 21

Richardson v. United Steelworkers,
864 F.2d 1162 (5th Cir. 1980) 20

Steele v. Louisville & Nashville Railroad Co., et al.,
323 U.S. 192 (1944) 16

Teamsters Loc. 42 v. NLRB,
825 F.2d 608 (1st Cir. 1987) 10, 21

UFCW Local 1036 v. NLRB,
307 F.3d 760 (9th Cir. 2002) 11, 15, 16

Virginia Panel Corp. v. MAC Panel Co.,
203 F.R.D. 236 (W.D. 2001) 25, 26

CONSTITUTION PROVISIONS:

First Amendment 4
Fifth Amendment 4

STATUTES:

29 U.S.C. Section 157 4
29 U.S.C. Section 158(b)(4)(B) 4
29 U.S.C. Section 158(e) 4
29 U.S.C. Section 159(a) 4
29 U.S.C. Section 159(c) 4
42 U.S.C. Section 2000e-2(m) 4

RULES:

Federal Rules of Civil Procedure, Rule 54(d)(1) 4

OTHER AUTHORITY:

Clark, Julia Penny, *"The DFR: A Theoretical Structure,"*
51 Tex. L. Rev. 1119 (1973) 12, 23, 28

M. Goldberg, *"The Duty of Fair Representation: What the Courts do in Fact,"*
34 Buffalo L. Rev. 89 (1985) 12, 27

Gregory, *"A Call for Supreme Court Clarification of the Duty of Fair Representation,"*
29 St. Louis Univ. L.Jnl. 45 (1984) 25

Issacharoff & Ortiz, *"Governing Through Intermediaries,"*
85 Va. L. Rev. 1627 (1999) 28

Kohler, T.C., *"Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment And the Problem of De Bartolo,"*
1990 Wisc. L. Rev. 149 (1990) 16

Siemer, C., *"Comment: Lehnert v. Ferris Faculty Assoc.: Accounting to Financial Core Members: Much A-Dues About Nothing,"*
60 Fordham L. Rev. 1057 (1992) 11, 16, 20

Simpson & Berwick, *"Exhaustion of Grievance Procedures and the Individual Employee,"* 28

Summers, C.W., *Union Powers and Workers' Rights,*
49 Mich. L. Rev. 805 (1951) 17, 19

Paul Tobias, *"Individual Employee Suits etc.,*
5 Toledo L.Rev. 514 18

Turner, R. *"Membership Obligations Under NLRA Section 8(a)(3): A Proposal for Statutory Change,"*
17 Hofstra Lab. & Emp. Law Jnl. 323 (1999-2000) . 5

Werntz, H., *"Waiver of Beck Rights,"*
43 Cath. U. L. Rev. 159 (1993) 14

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgments in Ninth Circuit Case Nos. 01-55937 and 02-55673 rendered in this case by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit Court of Appeals opinion in Case No. 01-55937 was issued January 16, 2003 and amended March 6, 2003 and is reported at 316 F.3d 974 (9th Cir. 2003), petition for reh. and reh. en banc denied and opinion amended at 322 F.3d 602 (9th Cir. 2003) [App. 1a]. In this case the Court of Appeals, affirming the district court's dismissal on summary judgment, held that Petitioners failed to raise triable issue of material fact that Respondents breached the duty of fair representation ("DFR") owed to Petitioners by removing Petitioners' work supply in and after May 1997, even if done with purpose to retaliate against Petitioners due to their efforts to decertify the union, because Respondents' interference with Petitioners' work supply *could not be deemed "representational activity"* [App. 20a-22a, 24a-25a] *despite the fact that Respondents testified they removed the work as a bargaining tactic to obtain leverage against Petitioners' then employer, Sorrento Coats.*

The Ninth Circuit further held that Petitioners failed to raise triable issue the Respondents breached the DFR by conditioning a CBA with, and restoration of work supply to, Sorrento, upon Sorrento's procuring dismissal of Petitioners' civil suit for Respondents' breach of DFR then pending in the Central District of California. App. 31a. The Court held that such conditioning did not unlawfully discriminate on the basis of union activity since it only distinguished between

employees who had sued for breach of DFR and those who had not [App. 30a-31a], notwithstanding that Respondents' conduct was calculated to, and did, result in the closure of Sorrento Coats where 40 out of 50 employees had petitioned for union decertification, ostensibly to the benefit of other bargaining units in the integrated production system comprised of M. Shapiro & Co. (the supplier, also injured by Respondents' interference), Sorrento (the largest and most skilled component of the system) and several smaller component companies. The Ninth Circuit also held that Petitioners did not raise triable issue that Respondents breached the DFR by refusing to supply Petitioners a copy of UNITE's CBA with Shapiro [App. 24a-25a] notwithstanding that Respondents invoked this agreement as the basis for their interference with Sorrento's work supply.[3] App. 42a-43a. Petitions for rehearing and rehearing en banc were denied on February 26, 2003 and March 6, 2003, respectively. Petitioners' Motion for Recall and Stay of Mandate was granted May 28, 2003.

The unreported decision of the District Court granting summary judgment in favor of Respondents issued on April 20, 2001. App. 45a. The district court held that Petitioners failed to raise triable issue that Respondents' conduct was discriminatory, retaliatory or in bad faith because, the court held despite conflicting evidence, Respondents claimed to believe that Petitioners' employer was involved in some way with Petitioners' decertification efforts as well as their civil suit for breach of DFR. App. 71a-75a. The district court found no triable issue as to arbitrariness of Respondents' continuous withholding of work from May 1997 through December 1998, foreseeably resulting in Sorrento's

[3] The Court also held that Petitioners failed to raise triable issue as to Respondents' intentional infliction of emotional distress.

bankruptcy and closure. App. 73a. The district court also held that Respondents did not violate the DFR in refusing Petitioners a copy of Respondents' CBA with Shapiro (allegedly relied upon in withholding work) because ultimately the district court found no breach in the union's withholding the work. App. 73a-74a.

The Court of Appeals decision in Case No. 02-55673 was issued on January 16, 2003. The Court held that the district court did not abuse its discretion in awarding Respondents costs in excess of $66,000, although the Court disapproved the district court's reliance on Petitioners' "failure to prove" that some person or entity other than Petitioners' would *not* pay the award. App. 90a-91a. Petitions for rehearing and rehearing en banc were denied on February 26, 2003. The unreported decision of the District Court awarding costs issued on July 2, 2001. App. 92a.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its judgments on January 16, 2003 and denied timely filed petitions for rehearing and rehearing en banc on February 26, 2003 and March 6, 2003, respectively. On May 19, 2003 this Court granted Petitioners an extension of time to and including June 27, 2003 within which time to file their petition for writ of certiorari. Petitioners invoke this court's jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions which are reproduced in the Appendix at App. 144a et seq.:

A. First and Fifth Amendments of the U.S. Constitution
B. 29 U.S.C. Section 159(a)
C. 29 U.S.C. Section 159(c)
D. 29 U.S.C. Section 157
E. 29 U.S.C. Section 158(b)(4)(B) and 158 Section 158(e)
F. 42 U.S.C. Section 2000e-2(m)
G. Federal Rules of Civil Procedure, Rule 54(d)(1)

STATEMENT OF THE CASE AND FACTS

A. Case History

On February 4, 1998 Respondents removed to federal court Petitioners' complaint alleging causes of action, inter alia, for breach of the duty of DFR and intentional infliction of emotional distress. Petitioners' suit is based on circumstances which ensued when UNITE, in response to Petitioners' decertification efforts, caused Shapiro, their employer's then sole supplier, to cease supplying work to Sorrento. Respondents' conduct resulted in Petitioners' unemployment and, ultimately, the closure of Sorrento.

On April 22, 1998 the district court denied Respondents' motion to dismiss for lack of subject matter jurisdiction. On May 8, 1998 Respondents moved for clarification and certification of the district court's disposition of certain issues raised in Respondents' motion to dismiss, which motion was denied.

On January 25, 1999 the court granted Petitioners leave to file their Second Amended Complaint adding allegations that Respondents separately breached the DFR in 1998 by refusing to allow resumption of work unless Petitioners dismissed their DFR action.

On or about May 12, 2000 Respondents moved for summary judgment. The district court issued its order granting summary judgment on April 20, 2001.

B. Statement of Facts

In 1990, after 45 days of violent, abusive picketing, overseen by Respondents, and without an election, Sorrento recognized the union as exclusive bargaining representative and instructed employees *they must join the union in order to continue to work.*[4] Prior to 1990 Sorrento had numerous suppliers and its employees worked year-round; after the union came in, its suppliers dwindled to one, Shaprio, the sole organized jobber[5]. Work (and income) became increasingly scarce.

The first CBA between the union and Sorrento provided that Sorrento would be Shapiro's "contractor of preference," entitled to "first priority in production of blazers;" in fact, Sorrento was Shapiro's favorite contractor due to its high work quality. Respondents' interference with Shapiro's

[4] Far from advising Sorrento workers of their "fair share" option, UNITE instructed the workers that they must pay full union dues *in order to maintain their health insurance*. Mandatory membership was, of course, unlawful, but neither Petitioners nor, apparently, their employer, knew this. Mandatory membership gave credence to Respondents' employment-related threats herein at issue. See Turner, R., "Membership Obligations Under NLRA Section 8(a)(3): A Proposal for Statutory Change," 17 Hofstra Lab. & Emp. Law Jnl., 323, 325, 330-331, 342 (1999-2000) (practically speaking, employees are unfamiliar with the "union member/financial core" legal terms of art and are led to believe they must join the union or lose their jobs, commenting on former NLRB Chairman Gould's concurrence that many workers and employees do not understand that membership means what the Supreme Court has said it means).

[5] Sorrento's suppliers also were victims of Respondents' violence.

economic relationship with Sorrento, which interference commenced immediately upon Petitioners' decertification petition in May 1997 and continued until Sorrento's closure in December 1998, led to foreseeable and irreparable injury to the Shapiro bargaining unit and the entire "integrated production system."

By 1997 Sorrento workers were desperately seeking a solution to a reduced workload of only 5-6 months of work per year. The workers considered the union had been unresponsive to repeatedly expressed concerns over lack of work as well as problems with health insurance. A consensus developed to "take the union out" and see if the customers (and workload) which had been lost, would return. The employees prepared a petition, which began, "We the people of Sorrento Coats no longer desire to be represented by the union," which was signed by 42 out of the 52 employees of Sorrento. App. 115a-117a.

As soon as they learned of the petition Orea and Guevara came to Sorrento and castigated the workers for their stupidity and disloyalty, telling them, "if with the union they ate beans, without the union they would *eat shit*," "*the war has just begun.*" ("He [Orea] said this to me in my [Petitioner Simo's] home; that what *we did* was going to have a heavy accounting and that the union was going to go to war").

Orea, Guevara, and other union agents engaged in a campaign of "home visits" in which, without notice or invitation, they descended on Petitioners' homes and remonstrated with them over their stupidity, telling them that *because of what they'd done, Sorrento would close, but if they would sign support for the Union, the Union would allow*

Sorrento to stay open.[6] Such threats comprise admissions of Respondents' intent to retaliate against the workers for their protected activity, which admissions belie their defense of legitimate concern over union standards.[7]

Nutter, Orea and Guevara immediately told Ron Shapiro to stop sending work to Sorrento. Shapiro testified that Nutter, Orea and Guevara told him that "because of the *illegal election at Sorrento*, Shapiro could no longer send work to Sorrento.'" Shapiro acquiesced and, over the next 18 months, continued to acquiesce in Respondents' demand, *even as the economic circumstances of his own company increasingly faltered* and he repeatedly pled to the union to be permitted to resume work with Sorrento. *During this time work which would have gone to Sorrento instead was sent to truly "non-union" contractors*.

Nutter testified the decision to pull the work was "***not the sort of issue***" Respondent would present to workers. Not only did Respondents not consult the Sorrento workers but also they *deliberately concealed from, and misrepresented to, them what Respondents were doing*. **Leovigilda Romero, a**

---

[6] Orea told Petitioner Osorio in her home, ". . . that usually when companies decertify the union, they end up closing down because their customers fear labor trouble." "Tony [Orea] went to visit me at my home [and] he said that *we were going to regret having signed the petition because we were going to lose our jobs*."

[7] Petitioners do not dispute that Sorrento notified the union it was withdrawing recognition based upon the petition, yet record evidence shows it was the petition which Respondents targeted in their threats to the workers as well as their demands to Shapiro. Respondents continued to withhold the work *after Sorrento resumed bargaining in late 1998, in the face of Sorrento's imminent bankruptcy and closure.*

union "steward" and de facto union agent with respect to the circumstances at issue, directly questioned Guevara, whether it was true, "what Simeon Prophet [Sorrento's owner] said, that the union told Shapiro to stop sending work," and Guevara answered, "No, they had not stopped it."[8] Such misrepresentations manifest bad faith. Orea testified that nothing that occurred over the 18 months the union embargoed the work (i.e., Petitioners' lengthy unemployment, Sorrento's return to the bargaining table, the faltering of the entire production system, and warning from Sorrento's only subsequently obtained supplier that it was about to pull its work due to the ongoing labor dispute) impacted his decision to continue withholding the work.[9]

After Respondents "pulled the work," Petitioners predictably ended up without work, unable to find alternative work,[10] and, consequently, endured dire economic circumstances, unable to make house payments, rent payments, car payments, or even to buy food. Petitioners also suffered retaliatory loss of insurance benefits. ***In the***

---

[8] The district court, ignoring clear and competent evidence of misrepresentation, appeared to buttress its holding on the absence of such evidence. App. 72a.

[9] Respondents neither struck nor picketed Sorrento in 1997, notwithstanding this was a contractual prerequisite for Respondents to require Shapiro to cease doing business with Sorrento under the "labor dispute" provision of the CBA; of course, by definition, Petitioners would have had a say in any strike or picketing of Sorrento.

[10] **Respondents were aware of the absence of alternative work opportunities for the Petitioners.** ***Under the Ninth Circuit's and trial court's analysis, this is irrelevant since the union has no duty to consider the unit employees' interests.***

summer of 1997 Petitioners appealed to UNITE to reverse the prohibition of Shapiro work or else to relinquish representative status so Sorrento might attract new work without the spectre of "labor troubles". Respondents denied Petitioners a hearing. In order to assist their counsel, Petitioners requested, and were admittedly denied (without any reason) a copy of UNITE's CBA with Shapiro.[11] In August 1997 and again in August 1998, Petitioners filed decertification petitions with the National Labor Relations Board ("NLRB") seeking a decertification election. App. 115a; App. 126a. Since, after learning of the initial petition, Respondents filed "blocking" unfair practice charges, the NLRB refused to conduct any election. App. 136a.

The record also reveals the adverse manner in which Respondents treated Sorrento relative to other components of the production system in which no decertification activity had occurred. Sorrento's working conditions were superior to

[11] UNITE's agreement with Shapiro differentiates between union and nonunion shops with respect to eligibility for work. Respondent's status as exclusive representative for Sorrento workers, as well as Sorrento's contractual entitlement to be Shapiro's "contractor of preference," provided Sorrento workers contractual entitlement to Shapiro work. Notwithstanding its invocation of such agreement as justification for its interference and the importance of Respondent's agreement with Shapiro to Petitioners' assessment of their rights, UNITE, without any justification, refused to supply a copy; the Court of Appeals found no DFR breach on "nonrepresentational conduct" grounds [App. 23a] (the district court, with circular reasoning, held that because there was no breach in Respondents' removal of work supply, nor could the refusal to supply the agreement deemed a DFR breach. App. 73a-74a.)

those at smaller contractors of Shapiro, yet UNITE "walked away" from those bargaining units, having concluded "it could not improve the terms and conditions of employment."[12]

Even after Sorrento resumed bargaining pursuant to a NLRB settlement of unfair practice charges, Respondents continued to withhold the work. UNITE refused to sign an agreement allowing resumption of Shapiro work *unless Sorrento could "get rid" of Petitioners' civil suit.* The trial court disregarded this discrimination because Respondents *contended* the employer "supported" Petitioners' civil action [App. 74a-75a], yet the record contains no evidentiary support for such contention and abundant evidence it did not.[13] In December 1998 Sorrento filed bankruptcy and shut its doors.

Through December 1998 Respondents conspired to threaten, harass and humiliate Petitioners. Petitioners were threatened with economic ruin, assault, termination, *deportation and imprisonment for their petition and pursuit of redress for breach of DFR.*[14,15]

---

[12] Respondents' rationale that they were sacrificing Sorrento for the sake of other members of the system thus is not plausible. Favoring one group over another due to union activity constitutes unlawful discrimination. Teamsters Loc. 42 v. NLRB, 825 F.2d 608, 611-612 (1st Cir. 1987).

[13] ("[Simeon] gather us together and told us that we had to withdraw the lawsuit that we had, because if we didn't it was going to close down the factory". In fact, union officials in their testimony expressly differentiated between the workers and Sorrento, indicating it was the workers (not Sorrento) who wanted the union out. Nutter testified that he did not know who was "behind" the litigation, he only had various "suspicions."

[14] Guevara and Romero threatened those who sued for breach of DFR with deportation and Romer also threatened Petitioners with deportation if they lost and couldn't pay costs. *The record supports reasonable inference*

REASONS FOR GRANTING THE WRIT

I. TIME IS RIPE FOR THIS COURT TO CLARIFY, AND RECONCILE, THE LEGAL TERM OF ART, "REPRESENTATIONAL CONDUCT," FOR PURPOSES OF DFR AND FAIR SHARE

This case affords the opportunity to timely revisit pivotal legal issues concerning individual liberties under the NLRA at a time when confusion over such issues is fueling state legislation, popular referenda, NLRB rulemaking, and "fair share" dues cases. The Court of Appeals' decision distorts the NLRA's essential tension between individual rights, on the one hand, and collective labor strength, on the other hand, in a manner which increases union power while decreasing its accountability to employees whom it represents. In so doing the Court of Appeals acts inconsistently with its holding in UFCW Local 1036 v. NLRB, 307 F3d 760 (9th Cir. 2002) and this Court's decision in Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).[16]

---

that Respondents were responsible for the summer 1998 placement of flowers, arranged in the shape of crosses, and black ribbons, at all factory entrances, predictably instilling fears of witchcraft among the diverse and unsophisticated immigrant workforce.

[15] Much of the foregoing evidence is **omitted** from the court's "factual background." Also indicative of the district court's bias is its continual allusion to Petitioners' demonstrated facts merely as "alleged" or "contended," while referring to Respondents' "facts", often unsupported by competent evidence, as "established" [See App. 49a, 71a] and its ***uncanny*** remark at March 20, 2002 hearing with respect to its decision to stay costs pending appeal, ***"I know I'm going to live to regret this."***

[16] This Court's "splintered" decision in Lehnert is ripe for clarification and *reconciliation with the definition of representative conduct for purposes of the DFR.* See, Siemer, C., "Comment: Lehnert v. Ferris Faculty Assoc.: Accounting to Financial Core Members: Much A-Dues

This Court's case precedent compels the conclusion that activity engaged in by an exclusive bargaining representative which is designed to directly impact the outcome of collective bargaining negotiations in the bargaining unit at issue comprises representational conduct. Airline Pilots Ass'n., Int'l v. O'Neill, 499 U.S. 65, 77 (1991) (DFR is implicated whenever the union "is acting in its representative role.").[17] The factual circumstances in Lehnert, although arising in context of defining representational conduct for fair share purposes, parallel those in Simo. In Lehnert the union was engaged in negotiating a new CBA, perceived its efforts to be ineffective, and began to prepare a "job action," i.e., to strike and shut operations down. Similarly, in Simo, UNITE was

---

About Nothing," 60 Fordham L. Rev. 1057, 1059, note 16, 1072 (1992), referring to the Lehnert decision as "the product of a severely divided court" and noting one commentator's allusion to the holding as "byzantine." See, also Hartley, R.C., 41 Hastings L.J. 1, 9 (1989) (critiquing "high level of abstraction" of Court's "dues" decisions). Clarification of the exclusive representative's constitutionally-derived common law DFR also is a task which has frustrated academics, practitioners, and the judiciary alike. See, e.g., Clark, J.P., The Duty of Fair Representation: A Theoretical Structure, 51 Tex.L.Rev. 1119, 1121-1122 (1973) ("...the kinds of union conduct that constituted DFR violation have never been satisfactorily defined [footnote omitted])". See also, Goldberg, "The Duty of Fair Representation: What The Courts Do In Fact," 34 Buff. L.Rev. 89, 103 (1985) (referring to the "Search for a Standard: 'Still Crazy After All These Years.'")

[17] See also, CWA v. Beck, 487 U.S. 735, 739 (1989); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976); Breininger v. Sheet Metal Workers International Association, 493 U.S. 67, 88 (1989). In Breininger, supra, at 89, this Court held that when a union adopts an "employer function" restricting employment opportunity, the DFR duty is *heightened* precisely because of the *direct impact* of the union's conduct on the represented individual's *employment opportunity*.

engaged in negotiating a new CBA, perceived its efforts to be ineffective, and began to prepare a "job action," i.e., a secondary boycott to shut Sorrento's operations down. As in Lehnert, UNITE's activity by its own admission was designed to "inure to the direct benefit of members of [Petitioners'] unit."

Nutter's testimony that UNITE "proposed" to Shapiro that it stop doing business with Sorrento "...because Sorrento was not bargaining in good faith and had not executed a contract extension that had been negotiated because it wanted the dispute to be resolved and the workers to return to work 'under the protection of what had been negotiated," falls squarely within the majority's holding in Lehnert.[18]

Given Nutter's testimony, the Court of Appeals' conclusion, that in stopping the work UNITE did *not* act in its representative capacity, is *confounding*. See App. 153a, 156a (e-mails of Professor Summers describing Ninth Circuit result in this regard as "incomprehensible" and "outrageous.") In so ruling the Court relied solely upon its observation that UNITE *could have pulled the work* even without being the Sorrento workers' exclusive representative. App. 21a. Yet,

[18] In Lehnert, supra, at 519, this Court determined that prerequisite to compelling expenditures for an activity under a fair share fee is a finding that the activity is "germane to collective bargaining activity." With direct application to Simo, the Lehnert majority found that strike preparation activities were germane to collective bargaining activity. Lehnert, supra, 528, 531-532. As Justice Kennedy noted in his concurrence, strike preparation activities are "indistinguishable in substance from other expenses of negotiating a collective bargaining agreement" and "reasonably incurred in order to perform the union's duties as bargaining representative." Lehnert, supra, 563.

just as a garment industry[19] union can engage in secondary boycott activity[20] without the status of exclusive representative, so also can a union engage in strike activity without such status, yet this does not detract from the

---

[19] The proposed Live Performing Arts Labor Relations Amendments Act would extend to the live performing arts industry the garment industry proviso's exemption from the NLRA's ban on "hot cargo" agreements.

[20] Notwithstanding that unions can engage in strikes without bearing exclusive representative status (i.e., to obtain that status), nevertheless, the strike has been recognized as the union's ultimate weapon in labor's arsenal for achieving agreement on its terms. NLRB v. Insurance Agents Int'l. U., 361 U.S. 477, 495 (1960) (the strike is the union's traditional normal weapon in collective bargaining). See, e.g., Werntz, H., "Waiver of Beck Rights and Resignation Rights: Infusing The Union – Member Relationship With Individualized Commitment," 43 Cath. U. L. Rev. 159, 172, (1993) note 50. "...[T]he union cannot compel the employer to bargain...unless it can apply economic pressure and do so effectively." Werntz, supra, note 57.

> "The union's collective bargaining function includes exerting economic force in support of the union's bargaining position...A strike is one of the central methods employed in collective bargaining for improving wages and working conditions....Boycotts, informational picketing and publicity other than picketing are other well-established union economic tools.[footnote omitted]...When undertaken to advance bargaining goals, these activities make a real and substantial contribution to the union's effectiveness as bargaining agent and therefore are chargeable to objectors."

Hartley, R.C., "Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases," 41 Hastings L.J. 1 at 48 (1989-90). See also, Abraham, D., "Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking In The New Economy," Abraham, supra, 1304.

representational character of the activity when engaged in, to influence negotiations.[21]

The Court of Appeals holding in Simo v. UNITE also appears to contradict its own holding in UFCW Local 1036 v. NLRB, supra, in which the Ninth Circuit held that a union may require represented workers to pay for organizing expenses within the competitive market. In UFCW Local 1036 the Court viewed the union's role as exclusive representative *expansively* to encompass conduct outside the bargaining unit if the NLRB, in its expertise, makes an "informed assessment of the practical relationship between the challenged activity and the bargaining process" and then concludes the challenged activity is, indeed, "germane."

The integrated production system in the garment industry can be seen as a microcosm of the competitive market. UNITE's decision to remove and continue to withhold work from Sorrento, based upon its "shifting" justifications that

[21] The secondary boycott, of course, is more powerful than the strike in that it shuts the employer down (by absence of work supply) and therefore is not threatened by members resigning to become strikebreakers. Cf. Pattern Makers League v. NLRB, 473 U.S. 95 (1985). With secondary boycotts there is no susceptibility to strikebreakers and their associated issues as discussed in the Pattern Makers case. See also, NLRB v. Local 54, 887 F2d 28, 33 (3rd Cir. 1989) noting that "voluntary unionism":

> "...does place upon the union the important responsibility to convince its members that the proposed strike is essential and is properly justified. This obligation requires the union's officers and the promoters of the strike in the democratic process to ensure widespread support of the strike action in order to forestall subsequent resignations or conversions to 'financial core' membership."

In contrast, Nutter testified that UNITE's withholding of work from Sorrento was "*not the sort of decision*" that UNITE would put before workers.

such was necessary to force Sorrento back to the bargaining table, to preserve the integrity of the integrated production system, and to promote the union's position in the industry generally, to the extent such justifications address "extra-unit" rationales for its conduct, remain conduct germane to its role as exclusive representative. The Court's discussion in UFCW Local 1036 v. NLRB of the importance of organizing competing employers to achieve the economic objectives of unit members *tracks* UNITE's shifting justifications for its conduct in the case at bar.

The right to work is subject to constitutional protection against arbitrary interference [Haggard, Thos. R., Compulsory Unionism, The NLRB and The Courts, 249 (Wharton School) (1977)]; the Section 7 right to organize *or decline to organize* is also a constitutional right[22] The extensive power of unions to regulate lives derives not solely

[22] The NLRA is anomalous in subordinating individual constitutional rights to collective statutory rights for the end of labor peace. Cf. Siemer, C., "Lehnert v. Ferris Faculty Ass'n.: Accountability To Financial Core Members: Much A-Dues About Nothing," 60 Fordham L.Rev. 1057, 1074, note 126, 1077, note 142. "...[T]he Court has repeatedly referred to the special nature of labor legislation to explain its unusual deference to a statute so incompatible with judicially developed constitutional norms." Kohler, T.C., "Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment And the Problem of De Bartolo," 1990 Wisc. L. Rev. 149, 155 (1990). In the fair representation context, "the statutory representative has 'at least as exacting a duty to protect equally the interests of the members ...as the constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. [footnote citation to Steele], [Steele v. Louisville & Nashville Railroad Co., et al., 323 U.S. 192, 202 (1944)]. Hartley, supra, 84. The union's actions as representative of individual employee interests are subject to due process requirements. Fair representation must satisfy the constitutional standard of adequate representation. Ibid.

from the union's own strength but also from the NLRA and the courts.[23] The DFR is to serve as a check on "this potentially abusable power." Ibid.

> "*Federal courts have avoided the problem of mixing constitutional law with labor law and the NLRA by finding a statutory obligation of the union to represent all employees fairly*. [citations omitted]."[24]

As a consequence of the lower court rulings, however, and contrary to the DFR goal articulated in Breininger v. Sheet Metal Workers Loc. 6, 493 U.S. 67, 86 (1984), to leave no individual worker "without redress" to protect his/her employment interests,[25] the Simo Petitioners: (i) were coerced against their will into unionization by violent picketing in 1990, then; (ii) when their working conditions had substantially deteriorated by 1997, engaged in concerted efforts to decertify the union; (iii) despite filing two petitions

---

[23] Summers, C.W., "Union Powers and Workers' Rights," 49 Mich. L.Rev. 805, 809 (1951). "As the recognized exclusive bargaining representative for all unit employees [footnote omitted], the union is endowed with enormous power over the rights and benefits those employees receive in the workplace. [footnote omitted]." Piskorski, T.J., "Labor Law: A Comprehensive Review of Seventh Circuit Labor and Employment Law Decisions, 1981-82 Term, 59 Chicago-Kent L.Rev., 625-626 (1982-83).

[24] Lynch, D.O., "Incomplete Exclusivity and Fair Representation: Inevitable Tensions in Florida's Public Sector Labor Law, 37 U. Miami L.Rev. 573, 609 (1983). [Emphasis supplied].

[25] See also, Lewis v. Tuscan Dairy Farms, 25 F.3d 1138, 1142 (2nd Cir. 1994), citing Aguinaga v. UFCW, 993 F.2d 1463, 1471 (10th Cir. 1993), citing in turn DelCostello v. IBT, 462 U.S. 151, 164 n.14, 76 L.Ed.2d 476, 103 S.Ct. 2281 (1983).

for decertification election (in August 1997 and again in August 1998) were denied an election (or hearing) by the NLRB[26]; (iv) were threatened by UNITE with plant closure, as well as of deportation or imprisonment, for persisting in efforts to refrain from representation and to enforce their rights in federal court; (v) have seen their plant shutdown and been thrown out of work, yet; (vi) have been denied due process on all of their claims! The foregoing history, hardly what the largely immigrant Petitioners expected to see in the

---

[26] Without any evidentiary hearing as to voluntariness, the NLRB deemed each petition "blocked" by unfair labor practice charges filed by UNITE following UNITE's notice of the decertification activity. App. 136a, 141a. The NLRB also denied Petitioners' request for permission to appeal from the denial of their motion for leave to intervene in said proceedings which were then settled on condition that Sorrento re-recognize and bargain with UNITE (thereby potentially creating an indefinite "contract bar" on a decertification election). In a separate opinion, ***Members Hurtgen and Brame expressed concern over the NLRB's "trampling" of Petitioners' Section 7 rights***. See, App. 127a, 134a-135a. See, Paul Tobias, "Individual Employee Suits etc.," 5 Toledo L.Rev. 514, 522 ("The NLRB is captive of a statute which is concerned primarily with the rights of unions and employees.") "Decertification bars ... touch at the very heart of employees' rights under the National Labor Relations Act." Caterair International v. NLRB, 22 F.3d 1114, 1122 (D.C. Cir. 1994), cert. den. 513 U.S. 1015; see also MV Transportation, 337 NLRB No. 129 (2002) (in case involving employee decertification petition NLRB overruled its divided holding in St. Elizabeth Manor, 329 NLRB 341 (1999), which imposed an irrebuttable, continuing presumption of union majority status, commenting with direct applicability to Simo v. UNITE:
"In reality, if a large percentage ... of the employees support a petition to decertify ..., the situation has reached maximum instability, and to fail to resolve the issue with a Board-conducted election simply aggravates the instability further. ...[T]he price of stability becomes too high if we say that the presumption cannot be rebutted, i.e., that the employees cannot reject the union if they so choose.")

"democratic" U.S.A., unfolded in part due to "fuzzy caselaw" and UNITE's asserted beliefs that (i) in interfering with the Sorrento work supply it was immune from liability for breach of DFR (even where its boycott had purpose and effect to retaliate against represented workers by depriving them of their employment for decertification efforts), and; (ii) in sacrificing Sorrento to the Shapiro integrated production system, and the Shapiro integrated production system to the "industry generally," it could take actions "on behalf of Sorrento workers" without any accountability to them.[27]

In conclusion, the constitutional principles of free association and equal protection which the DFR has evolved under federal common law to protect, in the single area of American jurisprudence in which individual rights are "subsumed" under collective rights, have been either ignored and/or misunderstood by the district court as well as the Court of Appeals.[28] The Court of Appeals in finding no

---

[27] Due to UNITE's sense of immunity, the ILGWU-ACTWU merger of "competing" unions, and the NLRB's blocking charges [App. 120a], UNITE was allowed to operate free of the "checks and balances" endemic to our system. "...[W]here the need for democracy is the greatest, the incentives to provide it are the smallest. It is no accident that the most dictatorial unions are those unchallenged by rivals." Summers, C.W., supra, 819. Due to similar sense of lack of accountability to represented workers, UNITE has accepted tens of millions of dollars annually as "liquidated damages" from union signatory employers, for extending such employers the "privilege" of exporting jobs offshore. While the Court of Appeals [App. 17a] thankfully rejected Respondents' "immunity" argument, it failed to see the logical inconsistency between its contention that the union could be sued for breach of DFR arising out of enforcement of a "hot cargo" agreement and its finding of no representational conduct.

[28] Clearly the "baseline" of the DFR is the union's status as exclusive bargaining representative, yet, the district court in its decisions in this case recorded that Petitioners had "obtained decertification" through their May

representative conduct alludes to cases in which the union was not the litigants' exclusive bargaining representative,[29] and in finding no discriminatory conduct analogizes Petitioners' judicial pursuit of DFR remedies to a disciplinary offense! See App. 31a. Such holdings reveal an unconscionable denigration of the Section 7 right to refrain and the Section 9 right to decertify.

II. THE COURT OF APPEALS APPLIED A FAULTY "PROOF MATRIX" REFLECTIVE OF ITS MISAPPREHENSION OF DFR OBLIGATIONS.

The Ninth Circuit's ruling also contravenes the national labor policy precluding any barriers to free employment on the basis of exercise of Section 7 rights.[30] The Ninth Circuit cursorily comments that cases cited by Petitioners on this

---

1997 petition and inquired as to whether that petition served to "eliminate" Respondents' DFR, notwithstanding that UNITE (i) never abdicated exclusive representative status over the Sorrento employees; (ii) based its "refusal to bargain" unfair labor practice NLRB charges against Sorrento on that status, and; (iii) by its own testimony, used its secondary boycott of the Shapiro work as a bargaining tactic to force Sorrento to the bargaining table.

[29] **Each of the cases [Kolinske v. Lubbers, 712 F.2d 471 (D.C. Cir. 1983); Richardson v. United Steelworkers, 864 F.2d 1162 (5th Cir. 1980); Karo v. San Diego Symphony Orch. Assn., 762 F.2d 819 (9th Cir. 1985); Felice v. Sever, 985 F.2d 1221 (3rd Cir. 1993)] which the Ninth Circuit cites in support of its dispositive ruling is totally inapposite as in each of those cases the defendant union was not the exclusive bargaining representative of the plaintiff with respect to the facts in issue. App. 19a-21a.**

[30] This policy is the foundation for the Taft-Hartley amendments outlawing the closed shop. See, Siemer, supra, 1061.

point were "merely NLRB cases" [App. 25a-26a], but this Court has held to the same effect: "...[T]he policy of the [NLRA] is to insulate employees' jobs from their organizational rights...allow[ing] employees to freely exercise their rights to join unions, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood." Radio Officers Union v. NLRB, 347 U.S. 17, 40 (1954). See also, NLRB v. Local 54, supra, 887 F.2d 28, 34 (3rd Cir. 1989), cert. den., 495 U.S. 904; NLRB v. Wismer & Becker, 603 F2d 1383, 1389 (9th Cir., 1979) (union action directed at employer to encourage or discourage union activity or refraint "breaches the wall erected by the Act between organizational rights and job opportunities").

Allocation of Shapiro work (to which Sorrento under its CBA had priority rights)[31] is analogous to hiring hall operation in that abuse in each instance links workers' exercise of Section 7 rights and employment opportunity. It is clear that a union may not administer a CBA in a manner to encourage unionization or conformity to union policy.

In confining its discrimination analysis solely to the Sorrento unit, as opposed to all component units in the integrated system, the Court misapplied applicable case precedent. App. 30a, 31a.[32] In circumstances in which a

[31] In this case uncontroverted evidence shows that Respondent controlled the allocation of Shapiro work (the sole unionized jobber in Southern California) to various component bargaining units of the integrated production system, thereby directly controlling employment opportunities for members of all system units.

[32] See, Teamsters Loc. 42 v. NLRB, 825 F.2d 608, 611-612 (1987) ("endtailing" unit with shorter union membership unlawfully favored politically favored group in breach of DFR); Bernard v. ALPA, 873 F.2d 213, 217 (9th Cir. 1989) (to same effect).

union's conduct clearly favors the interests of members of one bargaining unit over conflicting interests of another, the **relevant comparison** is between the unit adversely affected and the unit whose members' interests are alleged to be favored. UNITE favored the interests of members of other, smaller bargaining unit(s) over those of Sorrento because a majority of Sorrento workers petitioned for decertification and sought judicial redress for the loss of work which rendered them unemployed and ultimately bereft of a long-term employer.

The Ninth Circuit's **myopic** conclusions that "Quite obviously, the efforts to dismiss the lawsuit only affected those workers who had filed the lawsuit against the union" and that "there is no evidence that the union was motivated by any discriminatory intent based on any other characteristic of the workers who had brought the lawsuit" [App. 30a], ignore the simple fact that the Petitioners who sued for breach of DFR were the same workers who signed the decertification petitions.[33] Moreover, "[q]uite obviously" UNITE's conduct affected **all employees in the "politically disloyal" Sorrento bargaining unit.**

The arbitrariness standard requires the court to review the union's decisionmaking process for both motive[34] and also

---

[33] Petitioners' decertification efforts and their DFR suits *were different points on a single continuum of exercise of Section 7 rights* to refrain from representation by UNITE. The Court considered each alleged breach in isolation, whereas a "totality of circumstances" analysis is required to ascertain triable issues as to bad faith, dishonest, arbitrary, discriminatory or invidious conduct.

[34] The district court began and ended its analysis with observations that UNITE *contended* that Sorrento instigated the decertification and supported

procedure. Clark, supra, 1137. The court must look for *fair consideration* of the complaining employees' interests and *rational basis* for the union's conduct.[35] A bad faith standard alone will not curb arbitrary action: "[B]ecause the union can usually support either alternative with rational arguments, it can easily conceal improper motives." Clark, supra, 1138.[36]

In light of Respondents' assertions that it removed the Shapiro work as a bargaining tactic and record evidence as to discriminatory/retaliatory animus in removing the work supply, review of Respondents' conduct on remand must require application of the "mixed motive" analysis which this Court recently articulated in Desert Palace v. Costa. Although Desert Palace concerned Title VII claims, federal courts have held that Title VII precedent (including, by implication, precedent under the Civil Rights Act of 1991) may inform the Court with respect to analysis of proof burdens in DFR cases. Given the constitutional

---

the Petitioners' DFR litigation, such observations being factually uncorroborated and substantially controverted. App. 71a, 74a.

[35] **Both the district court's and the Court of Appeals' decisions are devoid of any such assessment of the needs of Petitioners or the foreseeable and actual effects upon Petitioners, of Respondents' 18-month embargo.**

[36] "*Defining the extent to which courts can examine the merits of a union dispute is crucial to cultivating the proper judicial role in DFR cases. ....[I]f review of the merits were forbidden... a requirement of rational decisionmaking would merely force unions to go through the motions of considering both sides.* The duty of fair representation must require more than formality, or it cannot secure representation for all employees." Clark, supra, 1139. [Emphasis supplied] "Within the DFR, courts have designated three motives that taint union decisions: race, personal animosity and *union activity*." Clark, supra, 1142. [Emphasis supplied].

underpinnings of Section 7 DFR cases, this Court should follow the Desert Palace, Inc. v. Costa precedent with respect to a "mixed motive" analysis in the case at bar and similar cases.

III. THIS COURT SHOULD GUIDE THE JUDICIARY WITH RESPECT TO CONSIDERATION OF THE FOLLOWING FACTORS IN "FIRST IMPRESSION" SECTION 7 DFR LITIGATION: (1) THE "CLOSE" AND "COMPLEX" FACTORS; (2) THE "PUBLIC BENEFIT" FACTOR; AND (3) THE GROSS ECONOMIC DISPARITY BETWEEN LARGE INSTITUTIONAL UNIONS AND INDIVIDUAL LITIGANTS AND RELATED "CHILLING EFFECT" UPON INDIVIDUAL WORKER SECTION 7 DFR LITIGANTS.[37]

Since the Court of Appeals expressly rejected the basis upon which the district court justified its substantial ($66,000+) costs award, i.e., Petitioners' supposed "failure to prove that someone else wouldn't pay the costs for them," the Court's failure to remand for further proceedings was improper. App. 88a. Moreover, the Court of Appeals failed to correct the district court's obvious misconstruction of the "closeness," "complexity" and "public importance" factors in assessing the propriety of a costs award.

---

[37] The Court of Appeals failed to apply its own precedent in Association of Mexican-American Educators v. State of California, 231 F.3d 572 (9th Cir. 2000). See also the recent decision, Mulvihill v. Spalding Worldwide Sports, Inc., 239 F. Supp. 2d 121 (D. Mass. 2002) (costs denied based on plaintiff's limited means, substantial impact of award requested, disparity of resources, colorable quality of plaintiff's case, professional manner in which case tried and significant public policy issues concerned).

The district court cursorily subsumed the "closeness," "complexity," and "public interest" factors into the "prevailing party" analysis [App. 95a], whereas "closeness" pertains to the "refinement of perception required to recognize, sift through and organize relevant evidence, and the difficulty of applying the law of the case." Virginia Panel Corp. v. MAC Panel Co., 203 F.R.D. 236, 237 (W.D. 2001). In the case at bar the legal concepts, and the district court's decision, are so abstruse that the parties even disagreed as to whether or not the district court reached defendants' "immunity" defense, defendants omitted such argument from their motion for judgment on the pleadings, both sides submitted declarations of former public officials in the labor arena, and the Ninth Circuit rested its ruling on a basis which the district court rejected three years earlier and which the preeminent scholar on the DFR has described as "incomprehensible" and "outrageous." See App. 153a, 156a. Commentators have long likened DFR caselaw to a legal "tower of Babel"[38] and since the onset of "financial core" litigation, confusion over the contours of the duty has intensified with considerable, nationwide, sociopolitical impact.[39]

---

[38] Gregory, "A Call for Supreme Court Clarification of the Duty of Fair Representation," 29 St. Louis Univ. L.Jnl. 45, 90 (1984).

[39] With respect to "public interest," notwithstanding its dismissal of Petitioners' claims, the district court *ruled against* Respondents on their primary defense of immunity under the garment industry proviso [App. 17a], which ruling provides a public benefit to all garment industry workers in rendering UNITE accountable for actions it takes adverse to the interests of the workers it represents. Respondents' officers and attorneys have actually argued that they had no duty even to consider the interests of represented workers in enforcing hot cargo agreements. Petitioners also prevailed on the issue whether their efforts to pursue intra-union remedies equitably tolled the statute not only for themselves but also others

Additionally, in its summary affirmance the Court of Appeals [App. 90a] adopted the district court's refusal to recognize Section 7 DFR litigation as constitutionally-infused "civil rights" litigation which the federal courts must protect against the "chilling effect" of such a large award, particularly where, as here, UNITE repeatedly threatened Petitioners that if they didn't withdraw their suit and couldn't pay costs, they would be imprisoned. Such threats come well within the "party misconduct" factor warranting denial of costs under Rule 54.[40]

Lastly, with respect to economic disparity, in nearly all modern-day Section 7 DFR situations the disparity, as in this case, will be gross. At least until this area of law becomes as well-developed as other areas of employment law (e.g.,

---

similarly situated. App. 56a-64a. Finally, the Court of Appeals rejected Respondents' DFR defense based on alleged employer sponsorship. App. 13a-16a. Arguably, under this Court's holding in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), such holdings "change the legal relationship between the parties," thereby rendering Petitioners the "prevailing parties" and all garment workers beneficiaries of the instant litigation. See also, Kinslow v. American Postal Workers Union, 222 F.3d 269 (7th Cir. 2000) (individual litigant's tenacity in pursuing LMRDA claim educational to union officers, hence, beneficial to all members).

[40] Moreover, there was ample evidence before the district court and Court of Appeals that Respondents, aware of Petitioners' limited resources, waged a "war of attrition" including such tactics as deposing each Petitioner on how she performed her tasks in "pressing," "operating button hole machine," "putting buttons," "putting faces," "trimming," etc., questions regarding styles of garments, questions delving into immaterial matters of personal privacy, etc. Additionally, in the case at bar, as in Virginia Panel, notwithstanding the Respondents' "technical" victory (in Virginia Panel by a particular affirmative defense, and in this case by the Court of Appeals' [erroneous] definition of "representational"), Petitioners were victims of Respondents' misconduct.

Section 1983, Title VII, ADEA), such that a "Section 7 DFR" plaintiffs' bar *even exists*, where economic disparity combines with the closeness, complexity, public benefit and chilling effect concerns, and the labor organization is well able to bear its own costs, imposition of such substantial costs ill serves the public policy of enforcement of equal employment opportunity law, including protection of NLRA Section 7 and the constitutionally based, common law of DFR.[41] Denial of such awards would also serve the desirable end of encouraging labor organizations to resolve such disputes equitably through intra-union grievance procedures, as Petitioners attempted in this case.

IV. CONCLUSION

To the extent that the confusion of the district court and Court of Appeals may itself be "representational" of a similar order of confusion over fundamentals of the DFR across the judiciary, there is urgent need for this Court to re-articulate such fundamental precepts as: the constitutional underpinnings of the DFR and the importance of maintaining the "wall" between employment opportunity and exercise of Section 7 rights. There also is compelling need for the Court to articulate the principled relation between the union's representational role for purposes of DFR and its representational role for purposes of fair share dues collection, particularly at a time when unions (i) seek to maximize the amount of mandatory dues to be spent at the

[41] See Braxton v. UPS, 148 F.R.D. 527, 528 (E.D. Pa. 1993) (denying costs to the Teamsters as a "large and wealthy adversary.") It has always been difficult for individual workers to find counsel willing to take Section 7 DFR cases. M. Goldberg, "The Duty of Fair Representation: What the Courts do in Fact," 34 Buffalo L. Rev. 89, 142-144 (1985) (commenting on the difficulty of obtaining services of an attorney for DFR cases).

union's discretion (including substitution of institutional and political goals over immediate goals of improving individual bargaining unit members' terms and conditions of employment), and; (ii) focus their organizing efforts on low-wage and immigrant workers who see only the power of the union and are not sophisticated enough to understand their rights under the complex "compromise" legislation that is the NLRA.

In sum, from all perspectives concerned, unions, individuals, employers, the NLRB and, of course, the courts, there is drastic need for clarification of this complex area of federal labor law. By illustrating significant social costs of the current situation, this case can serve as a vehicle to reassess and restate: the meaning of "representational" conduct for DFR and fair share purposes (particularly, its meaning as applied to "extra-unit" conduct or considerations); the measure and mode of proof of discriminatory or retaliatory action for exercise of Section 7 rights (to engage or refrain)[42]; the applicability of the Desert Palace v. Costa "mixed motive" proof standard, and; the standard of review in a DFR case of contested union action under the

[42] "Increased union strength in relation to both management and employees has made an expanded DFR even more mandatory. Unions are now more able to tolerate employee suits." Clark, J.P., supra, 1178. "....[A]s labor unions take a place alongside big business and big government as power centers in American society, conflicts between individual and group interests are less easily reconciled." Simpson & Berwick, "Exhaustion of Grievance Procedures and the Individual Employee," 51 Tex. L.Rev. 1179. See also, Issacharoff & Ortiz, "Governing Through Intermediaries," 85 Va. L. Rev. 1627, 1654 (1999) ("...[I]f unions could limit the possibility of decertification or restrict liability for the DFR, then internal constraints on self-serving union leadership behavior would fall.")

arbitrariness standard. Rarely do so many timely and compelling issues of widespread application, particularly on behalf of indigent Petitioners, coalesce in a single case and cry out for clarification in order to secure a just result. Left unredressed, this case will instill and "multiply" "injustice of the grossest sort": union-represented individuals "left without jobs and without a fair opportunity to secure an adequate remedy." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976). Finally, the Court of Appeals' precedential refusal to entertain Petitioners' constitutional and NLRA Section 7 civil rights and "chilling effects" concerns, in opposition to a costs award, also presents a case of first impression and a precedent which compounds the detrimental imbalance promoted by its decision on the merits.

Respectfully submitted,

LINDA S. KLIBANOW
Counsel of Record
LAW OFFICES OF LINDA S. KLIBANOW
225 S. Lake Avenue, Suite 300
Pasadena, California 91101
(626) 432-5479

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-55937
D.C. No. CV-98-00840-CAS

Argued and Submitted
December 2, 2002—Pasadena, California
Filed January 16, 2003
Amended March 6, 2003

Tauni Simo; Dalores Rowe; Maria Ramirez; Petra Villegas; Petra Deleon; Candy Fernandez; Gabriella Uribe; Angelina Perez; Maria Clark; Lourdes Gonzalez; Vilma Garcia; Dolores Olivas; Maria Osorio; Silvie Madrigal; Ana Gonzales; Maria Aguirre; Mariana Godina; Lidia Peraza; Chong Suk Kim; Claristine Hadley; Yong Hui Pak; Teresa Gomez; Noemi Maya; Teresa Wilson Sloan; Miyako Kanai,	)
Plaintiffs-Appellants,	)
v.	)
	)
Union of Needletrades, Banc and Industrial & Textile Employees, Southwest District Council; Union of Needletrades, Industrial & Textile Employees, AFL-CIO; Antonio Orea; Roxana Guevara,	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

JUDGES: Before: Dorothy W. Nelson and Thomas G. Nelson, Circuit Judges, and William W. Schwarzer,* Senior District Judge.

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING/REHEARING EN BANC AND AMENDED OPINION

ORDER

The opinion filed January 16, 2003, is amended as follows:

Slip op. at 762, line 9:	Replace the phrase "the union supporters" with "union officials and supporters"
Slip op. at 782, line 16:	In the sentence beginning "We find that the workers have not presented," replace "evidence amounting to" with "evidence that a reasonable jury could conclude amounts to"
Slip op. at 783, line 11:	Strike the paragraph beginning "Similarly, the union argues"

---

* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Slip op. at 788, line 1:	Strike the clause "that she wouldn't get her health benefits" and the comma following the clause
Slip op. at 788, line 23:	Before the sentence beginning "She also testified," insert "De Leon testified that, on one occasion, the union played loud music out of a van in the Sorrento parking lot."
Slip op. at 789, line 1:	Insert "and" before the clause "that if they didn't support the union"; in line 2, strike the clause "and that her health insurance had been canceled because she signed the decertification petition" and the preceding semicolon
Slip op. at 789, line 4:	Replace the phrase "She also testified that" with "She also testified that union officials mocked the workers by playing a song called 'Cardboard Houses' at the Sorrento factory, and that"

With these amendments to the Opinion, the panel has unanimously voted to deny appellants' petition for rehearing. Judge T.G. Nelson voted to deny the petition for rehearing en

banc. Judges D.W. Nelson and Schwarzer recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are DENIED.

OPINION

D.W. NELSON, Senior Circuit Judge:

This suit arises out of a contentious labor struggle at a garment factory in San Bernardino, California. Twenty-five garment workers ("the workers") brought suit against their union and its officials after the union engaged in secondary pressure to remove work from their factory. The workers alleged that their own union retaliated against them because they sought to have it decertified, in breach of the duty of fair representation ("DFR"), and that the union and the individual defendants initiated a campaign of harassment and intimidation constituting intentional infliction of emotional distress ("IIED"). In an unpublished order entered on April 23, 2001, the district court granted summary judgment on all claims, concluding that the workers had not produced evidence demonstrating the bad faith necessary for a DFR claim, nor evidence of outrageous conduct necessary for an IIED claim. We affirm the district court's ruling.

I. FACTUAL AND PROCEDURAL BACKGROUND

At all times relevant here, the Union of Needletrades, Industrial and Textile Employees Southwest District Council ("UNITE-SW") was the exclusive bargaining agent of the workers of Sorrento Coats, Inc. ("Sorrento"). UNITE-SW is an affiliate of the Union of Needletrades, Industrial and Textile Employees, AFL-CIO ("UNITE," and together with UNITE-SW, "the union"). Sorrento was part of an integrated production structure that included M. Shapiro & Co. ("Shapiro"), a jobber[1] that provided Sorrento with most of its work.

A. The decertification petition and the removal of the Shapiro work

In May 1997, forty-two of the workers—a majority of the represented unit—signed a petition stating that they no longer wanted the union to represent them. On May 12 Sorrento told the union that it was withdrawing recognition and would not implement an extension of its collective bargaining agreement ("CBA") that had been agreed to earlier that year. On May 14, 1997, the union requested that Shapiro, whose workers it represented and with whom it also had a CBA, stop sending work to Sorrento. Although there is some dispute as to whether it did so voluntarily, Shapiro complied, pulling its work from Sorrento. This secondary pressure is central to the claims in this case.

---

[1] In the garment industry, jobbers sell clothing to retailers and order it from the contractors and subcontractors who actually manufacture the clothing.

B. The request for the Shapiro collective bargaining agreement

After Shapiro pulled its work from Sorrento, counsel for the workers made various requests and demands of the union, including demands to be provided with a copy of the union's collective bargaining agreement with Shapiro. Counsel originally made this request in a letter to UNITE-SW dated June 27, 1997, and renewed the request in a letter to UNITE dated July 29, 1997. UNITE-SW, through its counsel, denied the request in a letter dated July 9, 1997, stating that such documents would not be disclosed in the absence of a legal obligation to do so. UNITE never specifically responded to the request for the Shapiro CBA but replied to the letter in which the request was made on August 14, 1997.

C. Proceedings before the National Labor Relations Board

On May 14, 1997, the union filed a charge with the National Labor Relations Board ("the Board") alleging unfair labor practices by Sorrento in violation of the National Labor Relations Act ("NLRA"), including unlawful withdrawal of recognition, refusal to bargain in good faith, refusal to execute the CBA extension, and making various statements to workers to encourage decertification of the union.[2] The union alleged that Sorrento management had sponsored the decertification effort. On November 6, 1997, the Board issued a complaint against Sorrento based on the union's charges.

---

[2] The union's charge was amended twice and a second charge, also amended, was filed later in 1997.

On August 22, 1997, counsel for the workers filed a petition with the Board on behalf of two workers, appellants Simo and Ramirez, seeking a decertification election for the Sorrento workers. On December 4, 1997, the Board's regional director dismissed the decertification petition, noting that the unfair labor practices alleged in the complaint against Sorrento tainted the evidence supporting the allegation that the workers no longer wanted the union (the "showing of interest").

On March 16, 1998, the union and Sorrento stipulated to a settlement of the Board's complaint, in which Sorrento would refrain from withdrawing recognition of the union, promising benefits to its workers if they rejected the union, or threatening its workers, and would begin bargaining with the union in good faith and implement the CBA extension. The Board approved the settlement in an order dated September 16, 1998.

D. Alleged harassment by the union and union officials

The workers have presented evidence of a campaign of harassment by the union, its officials, and its supporters after the workers signed the decertification petition. Much of the harassment was attributed to Leovigilda Romero, a Sorrento employee and former UNITE-SW shop steward. Romero called the workers "stupid bitches" and said the union would kick their butts; told the plaintiffs in this action that they were stupid and would go to jail if they lost their suit; threatened the workers with deportation; and flipped her middle finger at one of the workers who started dancing when the union supporters were playing music at the Sorrento factory.

The workers also testified to harassing behavior by UNITE-SW officers Antonio Orea and Roxana Guevara. Both Orea and Guevara apparently told workers that they would lose their jobs due to their attempts to decertify the union. Orea told workers that they would "regret" signing the petition, that "the war has just begun," and that the union was going to battle. Several workers testified that Guevara told them they were stupid to sign the decertification petition and that, if they had been eating beans with the union, without the union, they would be eating shit. One worker testified that Guevara threatened to call immigration about the workers who did not have papers.

The workers' testimony established that representatives of the union, including Orea, visited workers at their homes to try to convince them to support the union. During these visits the union representatives made various threats that Sorrento would lose the Shapiro work and that the workers would lose their jobs and their health insurance. One worker testified that a union representative screamed her name from her front gate during a home visit.

The workers also testified that, one morning, flower arrangements and black ribbons appeared at the entrances to the Sorrento factory. On another occasion, the union officials and supporters played music at the factory, including a song about poverty entitled "Cardboard Houses," to mock the other workers. Finally, the workers also testified as to their experiences during 1990, when union members apparently engaged in acts of violence during a strike at the Sorrento factory.

E. The instant action

On January 30, 1998, the workers filed the instant action in California state court. The union immediately removed the lawsuit to federal district court. The complaint included a claim for breach of the duty of fair representation under federal labor law, which was based on the union's pressure on Shapiro to withdraw work from Sorrento, allegedly in retaliation for the workers' efforts to decertify the union, and on the union's refusal to give the Sorrento workers a copy of the Shapiro CBA. The complaint also stated four state law claims, including intentional infliction of emotional distress, over which the district court exercised supplemental jurisdiction. In the course of this litigation, the district court dismissed all state law claims other than IIED, finding that they were preempted by federal law.

After the lawsuit was filed, Sorrento and the union began bargaining again, pursuant to their settlement before the Board. The workers presented evidence demonstrating that, as a condition to approving a new CBA extension and allowing the return of the Shapiro work, the union demanded that Sorrento secure a dismissal of this lawsuit. The workers subsequently amended their complaint in this case to allege that the union's actions in attempting to have the lawsuit dismissed constituted an additional breach of the DFR.

On April 20, 2001, the district court granted the union's motion for summary judgment. The court found that the union was entitled to use secondary pressure against Sorrento, that the union had no obligation to give the Sorrento workers a

copy of the Shapiro CBA, and that the union was entitled to attempt to obtain dismissal of a lawsuit that it believed to be employer-sponsored. Most importantly, the court found that plaintiffs had presented no evidence of bad faith or retaliatory motive on the part of the union necessary to substantiate a DFR claim. The court also found that the evidence presented did not reach the level of "outrageousness" required for an IIED claim and that several of the bases for the IIED claims were preempted by federal law.

The workers have appealed the grant of summary judgment as to their duty of fair representation and intentional infliction of emotional distress claims. They do not challenge the earlier dismissal of the other state law claims.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over the federal law DFR claim pursuant to 28 U.S.C. § 1337(a). *See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S.67, 83-84 (1989). The district court properly exercised supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367(a). We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

We review the district court's grant of summary judgment de novo. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact. *Id.* Summary judgment is improper if "there are any genuine

factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). We may affirm a grant of summary judgment on any ground supported by the record. *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 750 (9th Cir. 2001).

III. DISCUSSION

The union and the workers both make numerous legal arguments in favor of their respective positions. We address these arguments in the order we deem to be prudent and reach only those necessary to our disposition of this case. We conclude that the union is not liable for breach of the duty of fair representation, and that the workers have failed to produce evidence sufficient to maintain intentional infliction of emotional distress claims against any defendant.

A. Proper parties to this appeal

In their opposition brief, the union pointed out that two of the appellants— Teresa Wilson-Sloan and Miyako Kanai—were omitted from the Notice of Appeal. The workers subsequently moved to correct the Notice of Appeal, which was allowed by the Deputy Clerk. The union then filed a Motion to Reconsider Deputy Clerk's Order Granting Appellants' Motion to Correct Clerical Mistake in Appellants' Notice of Appeal, and the workers filed an opposition. This motion has been referred to this panel.

Fed. R. App. P. 3(c) provides that "[a]n appeal must not be dismissed . . . for failure to name a party whose intent to

appeal is otherwise clear from the notice." "If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward." Fed. R. App. P. 3(c) advisory committee's note. It is clear from the record that the omission of Wilson-Sloan and Kanai was an inadvertent clerical error stemming from their counsel's use of an incorrect caption; other pleadings before the district court (where the omitted plaintiffs clearly were parties) included the same incorrect caption. Furthermore, the workers' opening brief indicates that there are twenty-five appellants. Under such circumstances, it is objectively clear that the omitted workers intended to appeal; the Deputy Clerk properly allowed correction of the Notice of Appeal, and the motion for reconsideration is therefore denied.

B. Duty of fair representation

The workers raise DFR claims based on three acts of the union: its allegedly retaliatory application of secondary pressure on Shapiro to pull its work from Sorrento; its refusal to provide the Shapiro CBA; and its demand that Sorrento secure dismissal of the workers' lawsuit. The union counters that all of these claims are barred because the lawsuit is employer-sponsored, that federal law immunizes secondary pressure in the garment industry from DFR liability, that it had no obligation to turn over the Shapiro CBA, that it was entitled to seek the dismissal of a lawsuit it believes to be employer-sponsored, and that several of the claims are barred by the statute of limitations.

[1] The duty of fair representation owed by labor unions is not specifically articulated in any federal statute, but was created by the courts. With respect to unions recognized under the National Labor Relations Act, the DFR arises "from the grant under § 9(a) of the NLRA, 29 U.S.C. § 159(a) [ ], of the union's exclusive power to represent all employees in a particular bargaining unit." *Breininger*, 493 U.S. at 86-87. As the exclusive bargaining representative of the workers, the union has " 'a duty to exercise [its] power in their interest and behalf.' " *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74 (1991) (quoting *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944)). "[A] union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith.' " *Id.* at 67 (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). "The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries." *Id.* at 74.

We conclude that, although the workers' suit is not barred even if it is sponsored by Sorrento, the evidence does not show any violations of the duty of fair representation by the union. We therefore need not reach the question of whether the union's statute of limitations defense is viable.

1. Employer-sponsored lawsuits

The union asks this Court to find, based on allegedly uncontroverted evidence in the record, that this lawsuit has been sponsored by Sorrento and, therefore, the DFR claims must be dismissed. We need not reach the factual question of whether the undisputed evidence does in fact show employer

sponsorship because we find that employer sponsorship does not bar DFR claims brought pursuant to the NLRA.

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(4), prohibits any "interested employer" from financing, encouraging, or participating in any action by a union member against her union. There is no question that Sorrento is "interested" in the instant action. *See Adamszewski v. Local Lodge 1487, Int'l Ass'n of Machinists*, 496 F.2d 777, 784 (7th Cir. 1974) (an employer is interested in litigation if it "is concerned with it or is liable to be affected by it or has some self-interest in it"). Thus, assuming that Sorrento has encouraged this lawsuit, the question is whether such sponsorship requires dismissal of DFR claims.

The Ninth Circuit has never directly considered a § 101(a)(4) violation, but the prevailing view in other jurisdictions is that such a violation requires dismissal of claims brought under the LMRDA. *See Harris v. Plasterers Local 406*, 619 F.2d 1164, 1170 (7th Cir. 1980) (dismissing an LMRDA suit against a union because, among other reasons, it was "encouraged by an interested employer"); *Adamszewski*, 496 F.2d at 784-85; *Colapietro v. Int'l Ass'n of Machinists, Dist. 64*, 611 F. Supp. 90, 95-96 (D.R.I. 1985) (holding that where employer financed an LMRDA suit, the court had "no alternative but to dismiss the complaint"). *But see Verville v. Int'l Ass'n of Machinists*, 520 F.2d 615, 622 (6th Cir. 1975) (holding that § 101(a)(4) "is directed at employers" and does not "vitiat[e] a valid cause of action possessed by an employee"). The workers have not, however, asserted LMRDA claims, raising only duty of fair

representation claims under the NLRA and state law claims. The union points to no authority, and we have found none, in support of the argument that a § 101(a)(4) violation requires dismissal of claims arising from the NLRA or any law other than the LMRDA.

In *Adamszewski*, one of the cases on which the union relies, the Seventh Circuit held that such a violation does not preclude litigants from "pursuing any other remedies" other than LMRDA claims. 496 F.2d at 784-85. The court relied on the savings provisions of two statutes for this conclusion. First, LMRDA § 103 notes that the LMRDA does not limit the rights or remedies available to union members under other federal laws. 29 U.S.C. § 413; *see also* 496 F.2d at 784-85.

Second, LMRDA § 603 specifically provides that the LMRDA shall not be construed to "impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended." 29 U.S.C. § 523(b).

We agree with the holding of *Adamszewski*, and find support for our position in a previous Ninth Circuit decision. In *Fechtelkotter v. Air Line Pilots Ass'n, International*, 693 F.2d 899 (9th Cir. 1982), the panel considered a suit filed by Transamerica pilots against their union. The panel noted that, although they pursued claims under the Railway Labor Act and the Labor-Management Relations Act, "[t]he pilots have carefully avoided any attempt to invoke the LMRDA because Transamerica is supporting the litigation." *Id.* at 901. Although the panel ultimately dismissed the pilots' claims on other grounds, rendering any statements regarding LMRDA § 101(a)(4) dicta, we find no reason to depart from its views.

We hold that, even if Sorrento is encouraging this lawsuit, such support would bar only claims brought under the LMRDA, not under the NLRA or state law.

2. The union's retaliatory application of secondary pressure

The workers' first claim for breach of DFR rests on allegations that the union pressured Shapiro to pull its work from Sorrento in retaliation for the workers' efforts to decertify the union. The workers argue that the union acted in bad faith, failed to consult the workers, concealed their actions from the workers, and used the secondary pressure to coerce them in the exercise of their right not to join a union. The union counters that its conduct is completely immunized by a proviso to NLRA § 8(e) protecting secondary pressure in the garment industry.

The district court found that the union's activity was not completely immunized from DFR liability, but also found that the workers had shown no evidence of bad faith. Although we agree with the district court that the garment industry proviso does not protect the union from DFR liability, we find that, because the union was not acting in a representative role when it pulled the work from Sorrento, the duty of fair representation does not attach to its actions. We therefore do not reach the question of whether the workers presented evidence sufficient to sustain their allegations of bad faith.

[2] Under most circumstances, agreements between a union and an employer to boycott another employer are prohibited by NLRA § 8(e), 29 U.S.C. § 158(e). Mindful of

the special structure of the clothing and apparel industry, however, Congress added two provisos applicable only to that industry. The first exempts the garment industry from § 8(e)'s prohibitions; the second goes farther, providing "[t]hat nothing in this subchapter [the NLRA] shall prohibit the enforcement of any agreement which is within the foregoing exception." 29 U.S.C. § 158(e). As the union concedes, there are no reported decisions construing the scope of the second proviso.

[3] The union argues that the "plain language" of the proviso precludes all lawsuits arising under the NLRA, including DFR actions, based on secondary pressure in the garment industry. The union's interpretation is incorrect. The plain language of the proviso indicates that the NLRA cannot prohibit enforcement of a secondary agreement in the garment industry. The workers do not claim that the union's agreement with Shapiro was unlawful; rather, they claim that the act of exerting external pressure on Sorrento in order to retaliate against the workers' rejection of the union violated the DFR. In other words, it is not the secondary pressure that the workers challenge, but the motivation behind it.

[4] It is apparent from the legislative history that Congress never intended to immunize the union's actions against DFR claims. Instead, Congress was concerned that other parts of the NLRA—namely, § 8(b)(4) and § 8(e)—would prohibit agreements between unions and jobbers that prohibit the use of non-union contractors, which had long been used to organize the garment industry and eliminate sweatshop conditions. *See, e.g.*, Staff of Senate Committee on Labor and Public Welfare, Section-by-Section Analysis of the

Labor-Management Reporting and Disclosure Act of 1959, at 20 (Comm. Print 1959), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 966 (1959) (hereinafter "LMRDA History") (noting that the proviso exempts the garment industry from secondary boycott prohibitions and "hot cargo" provisions).[3] There is no explicit mention of NLRA § 9 nor implicit reference to the DFR in the legislative history. We therefore conclude that the proviso is intended to exempt secondary pressure in the garment industry from unfair labor practice liability—as indicated by the proviso's focus on prohibiting the enforcement of secondary agreements—but not to immunize unions from DFR liability whenever such secondary pressure is applied.

---

[3] *See also* 105 Cong. Rec. 19771 (1959), *reprinted in* 2 LMRDA History 1857 (analysis by Sen. Goldwater, indicating that the garment industry proviso "provides an exemption from all of" the prohibitions of § 8(e) "and from all of the prohibitions in the secondary boycott provisions of section 8(b)(4)"); 105 Cong. Rec. 17327 (1959), *reprinted in* 2 LMRDA History 1377 (remarks of Sen. J.F. Kennedy, who drafted the garment industry proviso, noting that the Senate could not accept provisions of the House bill prohibiting secondary boycotts unless "unions in the garment industry continue to have" the right to use secondary agreements); 105 Cong. Rec. 17381 (1959), *reprinted in* 2 LMRDA History 1385 (remarks of Sen. Javits, noting that the secondary boycott language in the original House bill "might wreck the whole structure of labor-management relations in the garment and clothing industries," and that therefore the bill must "explicitly exempt these traditional union-jobber agreements from secondary boycott prohibitions").

Our conclusion that the union is not immune from DFR liability does not compel a finding that the union has, in fact, breached its duty. The Supreme Court's jurisprudence makes it clear that the DFR is implicated because a union is acting under authority granted by statute or a collective bargaining agreement. In *Breininger*, for example, the Court considered whether a union's operation of a hiring hall was subject to the DFR. 493 U.S. at 85-90. The Court rejected an argument that the union was not acting in a representative capacity, finding that

> [o]nly because of its status as a Board-certified bargaining representative and by virtue of the power granted to it by the collective-bargaining agreement does a union gain the ability to refer workers for employment through a hiring hall. Together with this authority comes the responsibility to exercise it in a nonarbitrary and nondiscriminatory fashion, because the members of the bargaining unit have entrusted the union with the task of representing them.

Id. at 87-88. In *O'Neill*, the Court found that contract negotiations were subject to the DFR, essentially holding that the DFR is implicated whenever the union "is acting in its representative role." 499 U.S. at 77.

[5] Definitionally, however, the duty of fair representation does not apply where the union is not representing the workers in question. *See, e.g.*, *Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983) (" '[A] union . . . can be held to represent employees *unfairly* only in regard to those matters

as to which it represents them *at all*.' ") (emphasis in original); *see also Richardson v. United Steelworkers of Am.*, 864 F.2d 1162, 1166 (5th Cir. 1989) (holding that the "duty of fair representation generally governs a union's conduct vis-a-vis the bargaining unit members *when the union is representing them*" (emphasis added)). This Circuit has held that a union owes no duty to union members who are not members of the bargaining unit that the union is representing. *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 821 (9th Cir. 1985).

[6] Similarly, the Third Circuit, in a well-reasoned opinion analyzing *Breininger* and other Supreme Court precedent, found that "the duty of fair representation is inextricably linked to the union's status as exclusive bargaining representative in the collective bargaining process or in the administration of rights under a collective bargaining agreement." *Felice v. Sever*, 985 F.2d 1221, 1228 (3d Cir. 1993). There, the court considered whether an applicant for a police job, who had been previously employed at a union job and retained his union membership, could maintain a DFR claim when the same union, which also represented the police and had to approve funding for new hires, did not approve his application. *Id.* at 1223-24. The court held that he could not maintain a DFR claim because it was mere "happenstance" that he was a member of the union, and the union was not acting in a representative capacity. *Id.* at 1228-29.

[7] The same reasoning applies here. It is true that UNITE-SW continued to represent the Sorrento workers even after Sorrento repudiated the CBA extension and refused to bargain with the union, but the union was not acting in its

representative capacity when it sought to deprive Sorrento of work. The union could have exerted the same pressure on Shapiro to pull its work even if the workers had been successful in their attempts to decertify the union, or if the union had never represented the workers. It was not acting pursuant to any authority granted by statute as the exclusive representative of the Sorrento workers; nor was it acting pursuant to authority granted by the Sorrento CBA.[4]

As the Third Circuit noted in *Felice*, "[t]he thread that links *Breininger* and other duty of fair representation cases . . . is that the union is acting in its role as exclusive bargaining representative in the collective bargaining process." 985 F.2d at 1228. Here, the union was not doing so, and no DFR liability can attach.

[8] Finally, the workers also argue that the union's failure to consult with the Sorrento workers before pulling the Shapiro work violated the duty of fair representation. As the district court noted, however, "[i]n light of the . . . conclusion that the application of secondary pressure was not in itself a violation of the DFR, it cannot be said that a failure to consult with employees who would be adversely affected by such pressure was a violation of the DFR." The union was not acting in its capacity as representative of the Sorrento workers when it agreed with Shapiro not to send more work

---

[4] The parties dispute whether the union was acting under authority granted to it by the Shapiro CBA. Even if the union were doing so, however, it only would be under the duty to fairly represent the Shapiro workers in administering their CBA, not the Sorrento workers.

to Sorrento, and was not obliged to consult members of each represented unit that might be affected by the agreement. *See White v. White Rose Food*, 237 F.3d 174, 183 (2d Cir. 2001) (holding that where a union seeks ratification of an agreement by its members, it must consult them and explain the agreement to them, but where "such a ratification requirement is lacking . . . the union has no duty to inform the members of the agreement"). We find no breach of the duty of fair representation arising from the union's application of secondary pressure on Sorrento.

3. The union's refusal to disclose the Shapiro collective bargaining agreement

The workers argue that the duty of fair representation requires a union to give its members access to any documents necessary for the members to assess the union's conformance with its duty, and that the workers therefore had the right to copies of any CBA entered into by the union that affected them. They argue that they had a specific right to the Shapiro CBA because the union relied on provisions of the CBA to pressure Shapiro to pull its work from Sorrento. The workers' argument attempts to meld caselaw arising under the duty of fair representation and the LMRDA, without actually asserting claims under the LMRDA.

In support of their position, the workers cite two duty of fair representation cases, *NLRB v. IBEW Local 112*, 827 F.2d 530 (9th Cir. 1987) and *Anderson v. United Paperworkers*, 641 F.2d 574 (8th Cir. 1981). *IBEW Local 112* held that "[a] union's duty of fair representation requires it to permit hiring hall applicants to inspect dispatch records unless such

inspection is shown to be 'burdensome' or the records contain 'truly confidential material.' " 827 F.2d at 533. *Anderson* held that a union may not misrepresent to union members the terms of their CBA. 641 F.2d at 577 & n.2, 578. In both of these cases, however, the union's status as exclusive bargaining representative was implicated; in *IBEW Local 112*, the union gained its authority to operate a hiring hall only from a collective bargaining agreement, 827 F.2d at 532-33, and in *Anderson*, the union obviously was representing workers in entering into the CBA and thus had the responsibility to accurately explain its content. 641 F.2d at 576-78.

[9] Neither of these cases supports the idea that union members have a right to any information from their union that may affect them, such as a CBA with a different employer, when the union is not acting as the exclusive bargaining representative of the workers. As noted above, a union can breach the DFR only if it is in fact representing the workers; here, the union was not representing the Sorrento workers when it negotiated, agreed to, enforced, or administered any portion of the Shapiro CBA. Because the refusal to provide the CBA to the Sorrento workers does not implicate the union's status as the workers' unique representative, it cannot violate the DFR.

The workers also cite three cases arising under LMRDA § 104, 29 U.S.C. § 414. *See Dole v. Local 427, Int'l Union of Elec., Radio and Machine Workers*, 760 F. Supp. 423, 428 (D.N.J. 1991); *Colpo v. Gen. Teamsters Local Union 326*, 512 F. Supp. 1093, 1094-95 (D. Del. 1981); *Forline v. Helpers Local Union No. 42*, 211 F. Supp. 315 (E.D. Pa.

1962). Section 104 provides that a local union such as UNITE-SW has the duty to "forward a copy of each collective bargaining agreement made by such [union] with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement." 29 U.S.C. § 414. The cases cited by the workers support the idea that, under § 104, members of a local union are entitled to inspect all of the CBAs entered into by that union. *See Dole*, 760 F. Supp. at 428; *Colpo*, 512 F. Supp. at 1095. They do not, however, indicate that any violation of § 104 may be enforced through the duty of fair representation.

In determining whether to borrow the NLRA's statute of limitations for LMRDA claims, the Ninth Circuit has held that "[a] violation of section 104 by failing to give an employee a copy of the collective bargaining agreement is . . . . analogous to a union's violation of the duty of fair representation by failing to provide information to employees." *Gardner v. Int'l Tel. Employees Local No. 9*, 850 F.2d 518, 521-22 (9th Cir. 1988) (footnote omitted). In *Gardner*, however, a union member had been unable to obtain a copy of his *own* collective bargaining agreement, not a CBA covering a different unit. *Id.* at 519. We have found no cases in which the duty of fair representation has been extended to the context here, where a union refuses to provide its members with a CBA covering a different bargaining unit.

Although the union may have had a legal obligation to provide the Shapiro CBA under LMRDA § 104, it had no obligation arising from its status as the workers' exclusive bargaining representative, and thus its violation of § 104, if

any, would not constitute a breach of the DFR. To allow any violation of the LMRDA to be enforced through the DFR would eviscerate portions of the LMRDA itself, including the ban on employer-sponsored lawsuits discussed above.

4. The union's efforts to secure dismissal of the instant action

The workers have put forth evidence to show that, in its negotiations with Sorrento on a new collective bargaining agreement, the union demanded that the instant case be dismissed before it would allow the resumption of Shapiro work. They argue that this constitutes a breach of the duty of fair representation, effectively denying the workers of the right to sue their own union. The union argues, and the district court found, that there is no evidence of the union's bad faith in advancing this position, and that the union was simply attempting to secure dismissal of a lawsuit it believed to be employer-sponsored. We agree with the district court and find no breach of the DFR.

[10] The duty of fair representation unquestionably attaches to contract negotiations by a union. In *O'Neill*, the Supreme Court held that a union violates the DFR if it acts arbitrarily, discriminatorily, or in bad faith, in the bargaining process. 499 U.S. at 67. Unlike the decision to pull the Shapiro work, there is no question that, in its negotiations with Sorrento, the union was acting in its capacity as sole representative of the workers, and so the duty of fair representation is implicated.

In asserting that the union's conduct violated its duty, the workers do not indicate whether the union acted arbitrarily, discriminatorily, or in bad faith; instead, their argument relies on National Labor Relations Board decisions protecting union members' right of access to the Board. *See Local 45, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 320 N.L.R.B. 1079 (1996); *Constr. & Gen. Laborers, Local No. 304, Laborers' Int'l Union of N. Am.*, 265 N.L.R.B. 602 (1982). In each of these cases, the Board determined that the actions of the union violated NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), which provides that a union may not "restrain or coerce . . . employees in the exercise of rights guaranteed in [NLRA § 7]." *See Local 45*, 320 N.L.R.B. at 1081; *Constr. & Gen. Laborers*, 265 N.L.R.B. at 602. The rights guaranteed by § 7 include the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157, and these decisions hold that this language protects the employees' right to bring complaints before the Board. *See Local 45*, 320 N.L.R.B. at 1081; *Constr. & Gen. Laborers*, 265 N.L.R.B. at 602, 606-08.

Contrary to the workers' assertions, however, neither of these cases is a DFR case.[5] Even if we were to conclude that

---

[5] In *Construction & General Laborers*, the Administrative Law Judge also had found a breach of the duty of fair representation, although this holding does not appear in his conclusions of law, and he did not specify whether he thought the union's actions were arbitrary, discriminatory, or in bad faith. *See* 265 N.L.R.B. at 607-08, 610-11. The Board declined to reach the DFR issue, which

the union's attempts to dismiss this suit violated § 8(b)(1)(A), such conclusion would not compel a finding of a breach of the DFR. "The duty of fair representation is not intended to mirror the contours of § 8(b)," *Breininger*, 493 U.S. at 86; our analysis must be governed by the scope of the DFR. Limiting our inquiry to whether the union violated § 8(b)(1)(A) would undermine the Supreme Court's emphasis on the jurisdictional differences between duty of fair representation claims, which are cognizable in the first instance in federal court, and other unfair labor practice claims, which must first be brought to the Board:

> As we noted in *Beck*, "employees . . . may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." 487 U.S., at 743. When a plaintiff's only claim is that the union violated the NLRA, the plaintiff cannot avoid the jurisdiction of the NLRB by characterizing this alleged statutory violation as a breach of the duty of fair representation. To invoke federal jurisdiction when the claim is based in part on a violation of the NLRA, there must be something *more* than just a claim that the union violated the statute. The plaintiff must adduce facts suggesting that the union's violation of the statute was arbitrary, discriminatory, or in bad faith.

---

apparently had not been raised by the complainant. See id. at 602, 604-05.

Marquez v. Screen Actors Guild, 525 U.S. 33, 49-50 (1998) (quoting *Communications Workers v. Beck*, 497 U.S. 735, 743 (1988)). We therefore turn to whether the union's actions here were in fact arbitrary, discriminatory, or in bad faith.

[11] "Whether a union acted arbitrarily, discriminatorily or in bad faith requires a separate analysis, because each of these requirements represents a distinct and separate obligation." *Thompson v. Aluminum Co. of Am.*, 276 F.3d 651, 657 (4th Cir. 2002). Arbitrariness in the context of contract negotiations is governed by the standard articulated by the Supreme Court in *O'Neill*: "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), as to be irrational." 499 U.S. at 67 Under this standard, the fact that the union attempted to secure a dismissal of this lawsuit in the bargaining process is not *per se* unreasonable. The lawsuit was potentially very costly to the union, and it was not irrational for the union to attempt to limit these costs. Furthermore, the union has presented evidence that at least some of the workers were encouraged or recruited to join the lawsuit by Sorrento, potentially in violation of LMRDA § 101(a)(4). The union could have reasonably believed that it was in the best interests of the bargaining unit to seek dismissal of a lawsuit that was supported by the employer and that could be financially damaging.

It is true that, by seeking to dismiss the workers' lawsuit, the union was potentially favoring those members of the bargaining unit that had chosen not to sue the union.

Nonetheless, "[a] union's reasoned decision to support the interests of one group of employees over the competing interests of another group does not constitute arbitrary conduct." *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 129 (2d Cir. 1998).

[12] "Whereas the arbitrariness analysis looks to the objective adequacy of the Union's conduct, the discrimination and bad faith analyses look to the subjective motivation of the Union officials." *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1243 (7th Cir. 1997) (citation omitted). With respect to bad faith, we agree with the district court that the workers have failed to present any evidence that shows the union acted in bad faith. Although the workers strenuously argue that the union's unproven assertions of good faith should not be given credit, the structure of the duty of fair representation is that bad faith is required to show a breach; it is not simply that good faith is a defense to liability. The burden is on the workers to produce evidence of bad faith. *See Stevens v. Moore Bus. Forms, Inc.*, 18 F.3d 1443, 1447 (9th Cir. 1994); *see also Vaca*, 386 U.S. at 210 (Black, J., dissenting) (noting that in a DFR claim, "the employee will have the additional burden of proving that the union acted arbitrarily or in bad faith"). The workers cite no evidence that could lead a reasonable jury to conclude that the union acted in bad faith when, during negotiations with Sorrento, it attempted to secure dismissal of this lawsuit. Indeed, the workers cite no evidence at all, arguing only that their own good-faith efforts to pursue intra-union remedies are inconsistent with the union's position that it believed the lawsuit to be employer sponsored. This evidence is not

sufficient to raise a triable issue as to whether the union acted in bad faith.

[13] Whether the union's actions were discriminatory is a more difficult question. Quite obviously, the efforts to dismiss the lawsuit only affected those workers who had filed the lawsuit against the union, and thus the union could be said to be discriminating against those workers. On the other hand, there is no evidence that the union was motivated by any discriminatory intent based on any other characteristics of the workers who had brought the lawsuit.

The Supreme Court and our own published opinions give little guidance as to what constitutes discrimination in the duty of fair representation context. In *O'Neill*, the Court suggested that only "invidious" discrimination is prohibited by the DFR. 499 U.S. at 81. The Tenth Circuit has explained that "discrimination is invidious if based upon impermissible or immutable classifications such as race or other constitutionally protected categories, or arises from prejudice or animus." *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1359-60 (10th Cir. 1994). We think that these grounds are too restrictive; we have held, for example, that a union may not "discriminate on the basis of union membership." *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 216 (9th Cir. 1989). Nonetheless, we find no evidence of discriminatory intent here. In its contract negotiations, the union did not seek to grant benefits to some members of the bargaining unit that it denied to others, nor did it treat similarly situated individuals differently. It did not seek to punish the workers who brought the lawsuit. Instead, the union's efforts to resolve the lawsuit necessarily only affected those workers

who had brought the lawsuit, in the same way that a disciplinary policy necessarily affects only those workers with disciplinary violations.

[14] We conclude that the district court did not err in dismissing the workers' claim that the union breached its duty of fair representation when, in the course of contract negotiations, it sought the dismissal of the instant action. The union's actions were not arbitrary, discriminatory, or in bad faith.[6]

C. Intentional infliction of emotional distress

The workers claim that the union and the individual defendants Antonio Orea and Roxana Guevara (both officers of UNITE-SW) are liable for the state-law tort of intentional infliction of emotional distress. Ten of the appellants voluntarily dismissed their IIED claims with prejudice, so only the claims of the remaining fifteen are at issue.

---

[6] In holding that the union did not breach its duty by conditioning the resumption of Shapiro work on the dismissal of the instant action, we do not pass on the propriety of bargaining to impasse over such a condition. *See Swatts v. United Steelworkers*, 808 F.2d 1221, 1227 (7th Cir. 1986) (noting that "bargaining to impasse in flagrant disregard of union members' interests might in some circumstances be both a breach of the duty of fair representation and an unfair labor practice"). In this case, the workers did not allege or argue that the union violated the duty of fair representation by unreasonably bargaining to impasse.

The district court ruled that the workers' intentional infliction of emotional distress claims based on loss of work and loss of health benefits were preempted by federal law. The workers do not challenge these holdings in this appeal. The district court also found that the remaining allegations of IIED, mostly consisting of harassing and threatening conduct, including home visits by union officials, was not "outrageous" under California law.

The workers argue that the conduct of the union, Orea and Guevara was, in fact, outrageous. The union challenges that a number of the acts cited by the workers in support of their intentional infliction of emotional distress claims are either not attributable to the union or preempted by federal law.

1. Actions for which the appellees may be held liable

Before turning to the issue of whether the evidence presented by the workers is sufficient to meet the elements of intentional infliction of emotional distress, we first examine what evidence may be considered with respect to each appellee. This analysis includes whether each appellee may be liable for the acts of others, as well as whether certain types of conduct may be preempted by federal law.

The workers have not alleged or argued conspiracy or any other theory that would make the appellees generally liable for all of the allegedly outrageous acts. They have argued no theories that would allow appellees Orea and Guevara to be held liable for anyone's actions but their own. Viewing the workers' pleadings charitably, they have argued that Orea and Guevara are agents of UNITE-SW, and that UNITE is liable

for the actions of UNITE-SW. They also argue that the actions of former union steward Leovigilda Romero are attributable to the union.[7]

The union's liability for its purported agents is governed by Norris-LaGuardia Act § 6, 29 U.S.C. § 106. This section requires "clear proof" of participation, authorization, or ratification before a union can be held liable for the acts of its officers or members. *Id.* The workers' protestations to the contrary notwithstanding, the "clear proof" standard is applicable to this case. The Supreme Court held in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), that "[p]lainly, § 6 applies to federal court adjudications of state tort claims arising out of labor disputes." *Id.* at 737. There can be no doubt that the conduct at issue here arose out of a labor dispute.

The union does not challenge the workers have raised triable issues of fact as to UNITE's liability for the conduct of UNITE-SW, and as to Orea's and Guevara's agency, but vigorously disputes the union's liability for Romero's actions. We find that the workers have not presented evidence that a reasonable jury could conclude amounts to "clear proof" that the union authorized or ratified Romero's actions. At most, the evidence demonstrates only that Romero was a former shop steward who still maintained contact with union officials,

---

[7] The workers also suggest that the actions of union steward Carmen Garcia should be attributed to the union. Because they make no argument and present no evidence as to her agency, we will not consider her actions against the union.

including Guevara and Orea.[8] Thus, we will not consider Romero's acts in our analysis of intentional infliction of emotional distress.

The union also argues that it cannot be held liable for an incident in which unknown persons placed flowers and black ribbons at the entrances to the Sorrento factory, which some of the workers interpreted as a death threat or as evidence of witchcraft. The workers have presented no evidence that would allow a reasonable jury to find that Orea or Guevara was responsible for the placing of the flowers. Furthermore, even if circumstantial evidence might lead a jury to conclude that union supporters placed the flowers, there is no "clear proof" that the union authorized or ratified this act, and therefore it cannot be considered against the union either. *See* 29 U.S.C. § 106.

---

[8] The workers cite the following evidence in support of their argument that the union had given Romero authority to act: Guevara testified that, although not a shop steward, Romero provided her with information about Sorrento; Romero testified that the union representatives told her that Tauni Simo was the new shop steward; one worker said she thought Romero worked for the union because she talked to the union representatives, wore a union t-shirt, and used to be a shop steward; Romero told two workers that she knew they were plaintiffs because she had gotten their names from the union; a worker identified her as a current shop steward, but gave no basis for this assertion; Romero taunted the plaintiffs; a worker testified that "it was rumored" that Romero was a union representative; Orea and Guevara gave the workers forms to fill out and told them they could return them to Romero.

Finally, the union argues that consideration of the evidence of allegedly harassing home visits by union officials is preempted by federal labor law. Under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), actions regulated directly by the NLRA generally may not be regulated by state tort law. *Id.* at 243-45. "When it is clear . . . that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." *Id.* at 244. The union cites cases that suggest that home visits are permitted by the NLRA and prohibited as an unfair labor practice if they are threatening or coercive. *See Randell Warehouse of Ariz., Inc.*, 328 N.L.R.B. 1034, 1037 (1999) (visits by union representatives "are unobjectionable so long as they are unaccompanied by threats or other coercive conduct"); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540 (1992) (implying that home visits are a perfectly acceptable means for the union to contact workers).

Although coercive home visits might constitute an unfair labor practice, "[t]he fact that a state tort may also constitute an unfair labor practice . . . does not inevitably cause preemption of the state claim." *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 785 (9th Cir. 2001). The Supreme Court has limited *Garmon*-preemption in the context of intentional infliction of emotional distress. In *Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977), the Court considered an employee's claims that his union harassed and intimidated him when he complained about the discriminatory operation of a hiring hall. Although noting that discrimination in the operation of a hiring hall is regulated by

federal labor law, id. at 303 & n.12, the Court nonetheless allowed the employee's IIED claims to proceed under California law:

> [R]igid application of the Garmon doctrine might support the conclusion . . . [that the employee's] entire action was pre-empted by federal law. Our cases indicate, however, that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme. With respect to [the employee's] claims of intentional infliction of emotional distress, we cannot conclude that Congress intended exclusive jurisdiction to lie in the Board.
>
> No provision of the National Labor Relations Act protects the "outrageous conduct" complained of by [the employee] . . . . Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so outrageous that "no reasonable man in a civilized society should be expected to endure it."

Id. at 302; *see also Radcliffe*, 254 F.3d at 785. We find the resolution of this issue squarely controlled by *Farmer*, and thus hold that the allegedly threatening and intimidating home visits may be considered against the union.

2. The elements of intentional infliction of emotional distress

The supplemental state claims of intentional infliction of emotional distress are governed by California law. Under California law,

> the elements of intentional infliction of emotional distress are:
>
> > (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by defendant's outrageous conduct.
>
> *Christensen v. Superior Court*, 54 Cal. 3d 868, [903,] 820 P.2d 181, 202 (Cal. 1991) (in bank) (quotations and citations omitted). The conduct must not only be intentional and outrageous, but must also be "directed at plaintiff, or occur in the presence of a plaintiff of whom defendant is aware." *Id.*

Sabow v. United States, 93 F.3d 1445, 1454-55 (9th Cir. 1996) (alteration in original). "Conduct is deemed outrageous if it is 'so extreme as to exceed all bounds of that usually tolerated in a civilized community.' " *Saridakis v. United Airlines*, 166 F.3d 1272, 1278 (9th Cir. 1999).

We find that our analysis is simplified by addressing these required elements in reverse order. Although the parties failed to do so in their briefs, we find it necessary to consider the claims of each appellant individually. We conclude that none has presented evidence to demonstrate all of the elements of intentional infliction of emotional distress.

Seven appellants have not demonstrated severe emotional distress. "Severe emotional distress means emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." *Kiseskey v. Carpenters' Trust for So. Cal.*, 192 Cal. Rptr. 492, 497 (Cal. Ct. App. 1983) (internal quotation marks omitted). Appellants Chong Suk Kim, Gabriela Uribe, Maria Osorio, Silvie Madrigal, and Lourdes Gonzalez each testified only that they felt threatened or scared by the union's conduct. Appellant Angelina Perez testified that she felt nervousness and tension, and was "emotionally hurt." Appellant Teresa Wilson-Sloan's testimony includes no references to any distress. None of these injuries rises to the level of severe emotional distress required by California law.

Causation is lacking for at least three other appellants. Maria Clark, Maria Aguirre, and Vilma Garcia each testified that her emotional distress was caused by her loss of work, lack of money, or both. Because claims for emotional distress based on loss of work were found to be preempted in the unchallenged holding of the district court, we will not consider such claims. These appellants did not testify that they suffered distress due to the harassing conduct of the union.

The remaining five appellants—Maria Ramirez, Tauni Simo, Petra de Leon, Mariana Godina, and Ana Gonzalez—all testified to severe emotional distress that a jury could reasonably find was caused by the union's alleged harassment. The remaining question is whether the conduct of the appellees was "outrageous" and could be found to be intended to cause emotional distress. In conducting this analysis, we note that none of the appellees could be held liable if UNITE-SW is not liable; UNITE's liability is derivative of UNITE-SW's, and the actions of Orea and Guevara may be considered in determining UNITE-SW's liability.

Although outrageous conduct is defined by state law, the definition has federal implications. As noted above, the Supreme Court in *Farmer* found that federal labor law did not preempt IIED claims, but it noted that

> [o]ur decision rests in part on our understanding that California law permits recovery only for emotional distress sustained as a result of 'outrageous' conduct. The potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts.

430 U.S. at 305-06. Thus, the conduct complained of here must be more severe than ordinarily found in a labor dispute.

With certain pieces of evidence properly excluded pursuant to the discussion above, the evidence of outrageous conduct presented by each remaining appellant is as follows:

- Appellant Ramirez testified that Orea told her that she "was going to regret" her efforts to decertify the union; that both Orea and Guevara told her she would not have work anymore; and that Orea told the workers during a meeting that "the war has just begun." She also testified that union representatives visited her house three times, although she was only home the third time, when a union official told her that they would regret signing the decertification petition, and "not to be so stupid and believe the employer's promises."

- Appellant Simo testified that Guevara told the workers they were stupid for supporting the decertification petition, and that "without the union, we would be eating just plain shit." She also testified that Orea visited her home (which Orea also confirmed) and told her that if the employer "wanted war, he was going to have war" and that the union was going to go to battle; that the workers would be sorry for what they had done; that the union would block work from coming into Sorrento and the workers would end up without jobs; and that the union would try to come back by any means.

- Appellant de Leon testified that Guevara told her "that we're stupid and ignorant by not accepting the union because if . . . with the union we were eating beans, without the union we were going to eat shit[,] and that we were going to be sorry for that because they were going to take our jobs

away." De Leon testified that, on one occasion, the union played loud music out of a van in the Sorrento parking lot. She also testified that union representatives visited her twice at home, and that one told her that if she didn't support the union, she would lose her job because Shapiro would pull the work; that the Sorrento factory would end up closing; and that the workers had to take the union back. When asked whether anyone from the union had harassed her, de Leon only mentioned the comments of Leovigilda Romero.

- Appellant Godina testified that Guevara told her that "with the union we at least were able to eat beans, but without the union we would be eating shit"; that the union had withdrawn the Shapiro work; and that if they didn't support the union, they wouldn't have any work. She also testified that union officials mocked the workers by playing a song called 'Cardboard Houses' at the Sorrento factory, and that de Leon had told her that the union had been violent during a strike in 1990.

- Appellant Ana Gonzalez testified that Guevara told her that she would call immigration about the people who didn't have papers; that they were going to be sorry; and that if they had been eating beans, they were going to eat shit. She also testified that union representatives visited her three times at her home, where she has a gate and dog. The first time, a man yelled and screamed her name from the gate, and told her to sign the union

> card so that they would have work; the second time, a woman shouted and knocked on her fence; the third time she had been notified by a co-worker that a union person would be coming, so she just ignored the visit.

As the district court found, this evidence simply is not sufficient to support an allegation of outrageousness. The most compelling testimony is Ana Gonzalez's statement that Guevara threatened to call immigration, but there is no evidence that she felt threatened and suffered emotional distress as a result of this comment.

The workers cite four cases to suggest that they have shown outrageous conduct, but all are irrelevant or easily distinguishable. *See Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1412-13 (9th Cir. 1992) (considering preemption but not reaching the substance of the IIED claim); Accardi v. Superior Court, 17 Cal. App. 4th 341 (1993) (same); *Kiseskey*, 192 Cal. Rptr. at 496 (finding that "threats of physical violence or death" were outrageous); *Kinnamon v. Straitman & Snyder*, 132 Cal. Rptr. 321, 323 (Cal. Ct. App. 1977) (holding that lawyers' false and illegal threat to file criminal charges against a person who wrote a bad check would constitute outrageous conduct). These cases are not persuasive; rather, we find that the union's conduct here is exactly "the type of robust language and clash of strong personalities that may be commonplace in various labor contexts." *Farmer*, 430 U.S. at 306. As such, it cannot form

the basis of an intentional infliction of emotional distress claim.[9]

D. The union's motion to strike

After the workers' opening brief before this Court was filed, the union filed a motion to strike the brief and the Excerpts of Record on the grounds that they were in violation of Ninth Circuit Rules 30-1.1, 30-1.4, and 30-1.5. The union also asked for a new briefing schedule so that the workers could file a new opening brief and Excerpts of Record.

Because this motion was referred to the merits panel rather than to a motions panel, its goals are now effectively moot. We do not condone the apparent violations of the rules of this Court; had we heard this motion at an earlier stage of this case, we very well might have granted it. Nonetheless, this case has been extensively briefed, and striking the workers' opening brief and Excerpts of Record now would serve no legitimate purpose.

---

[9] The union also argues that some of Orea's and Guevara's statements are protected speech under both the First Amendment and federal labor law. *See, e.g., Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974) ("[F]ederal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point."). Because we find that these statements do not constitute outrageous conduct, we need not reach the issue of whether they might be protected.

IV. CONCLUSION

The district court's grant of summary judgment as to all claims is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-98-00840 CAS (Ctx)

[Filed April 20, 2001]

TAUNI SIMO, DALORES ROWE, MARIA RAMIREZ, PETRA VILLEGAS, PETRA DELEON, CANDY FERNANDEZ, GABRIELA URIBE, ANGELINA PEREZ, MARIA CLARK, LOURDES GONZALEZ, VILMA GARCIA, DOLORES OLIVAS, MARIA OSORIO, SILVIE MADRIGAL, ANA GONZALES, MARIA AGUIRRE, MARINA GODINA, LIDIA PERAZA, CHONG SUK KIM, CLARISTINE HADLEY, TERESA WILSON-SLOAN, MIYAKO KANAI, TERESA GOMEZ, NOEMI MAYA, and YONG HUI PAK,

Plaintiffs,

v.

UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES, SOUTHWEST DISTRICT COUNCIL, UNION OF NEEDLETRADES, INDUSTRIAL &

TEXTILE EMPLOYEES, AFL-CIO; ANTONIO OREA; ROXANA GUEVARA; and DOES 1-50,

Defendants

OPINION

I. INTRODUCTION AND FACTUAL BACKGROUND

A. The Parties

Plaintiffs were employees of Sorrento Coats, Inc. ("Sorrento"), a garment manufacturer located in San Bernardino, California.[1] Starting in 1990, Sorrento operated under a series of collective bargaining agreements ("CBAs") with defendant Union of Needletrades, Industrial & Textile Employees, Southwest District Council ("UNITE-SW"), an affiliate of defendant Union of Needletrades, Industrial & Textile Employees, AFL-CIO ("UNITE"} (collectively "the union"). Plaintiffs also named as defendants Antonio Orea and Roxana Guevara, employees of UNITE-SW.

B. Factual Background

The following facts are not in dispute. In Spring 1997, 42 Sorrento employees (including 19 of the 25 plaintiffs) signed a petition stating in its English version: "We the People of Sorrento coats [sic] do not want to be represented by the

[1] In December 1998, Sorrento filed a bankruptcy petition and closed its doors. Pls.' Sep. Stmt. of Controverted and Uncontroverted Facts, ¶ 18.

union anymore." Rubin Decl., Ex. 4 at I0. On May 12, 1997, Sorrento sent a letter to UNITE-SW formally withdrawing recognition of UNITE-SW as the exclusive bargaining representative of its workers and refused to execute the CBA extension it had previously negotiated.[2] On May 13, 1997, Sorrento sent a letter to its chief supplier of work, M. Shapiro & Co. ("Shapiro"),[3] advising it that Sorrento had withdrawn recognition from UNITE-SW and instructing Shapiro to stop deducting union health and welfare contributions from its payments to Sorrento on account of Sorrento employees' wages.[4]

---

[2] Sorrento's May 12, 1997 letter to UNITE-SW stated: "Please be advised that Sorrento Coats has received a petition signed by a majority of the unit employees stating that they no longer want to be represented by the Union of Needletrades, Industrial and Textile Employees (UNITE). Accordingly, Sorrento Coats hereby withdraws recognition of UNITE effective immediately." Rubin Decl., Ex. 5 at 12.

[3] Shapiro acted as a jobber for Sorrento and contracted for Sorrento's services as a garment manufacturer. The CBA between the union and Shapiro stated that "Employer [Shapiro] and its contractors . . . are jointly engaged in an integrated production effort." Shapiro CBA Art. 23, § 2, Rubin Decl. Ex. 24 at 372.

[4] Sorrento's May 13, 1997 letter to Shapiro stated: "This is to advise you that effective May 12, 1997, Sorrento Coats has withdrawn recognition of the Union of Needletrades, Industrial and Textile Employees, APL-CIO (UNITE). Accordingly, no further deductions of any kind on behalf of UNITE should be made from amounts payable by M. Shapiro to Sorrento Coats." Rubin Decl., Ex. 6 at 14.

On May 14, 1997, defendants filed an unfair labor practice ("ULP") charge with the National Labor Relations Board ("NLRB") pursuant to § B(a) (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 15B(a) (5), claiming that Sorrento "engag[ed] in conduct at and away from the bargaining table that seeks to undermine the Union's status as exclusive bargaining representative of the Employer's employees." Rubin Decl., Ex. 7 at 16. The NLRB issued an order on March 6, 1998, which required that Sorrento refrain from (1) unlawfully withdrawing recognition from UNITE-SW, (2) engaging in direct dealing with collective bargaining unit employees, (3) threatening employees with closure of the Sorrento facility if they continued to support UNITE-SW or if UNITE-SW continued to represent them, (4) initiating or assisting in the circulation of a petition to decertify UNITE-SW, and (5) engaging in other proscribed activities. Rubin Decl., Ex. 14-D.

Defendants also sent a letter to Shapiro on May 14, 1997, requesting that Shapiro cease sending work to Sorrento.[5] The

---

[5] Defendants' May 14, 1997 letter to Shapiro stated:

> As you know, for many years, your company has used Sorrento Coats to perform services for it that are part of an integrated process of production in the garment industry. Your relationship with Sorrento Coats has existed because Sorrento Coats has been party to a collective-bargaining agreement, and as [sic] collective bargaining relationship, with UNITE.

UNITE's contract with Sorrento Coats expired

following day, counsel for Sorrento demanded by letter that defendants cease and desist from engaging in secondary activities intended to cause Shapiro to cease doing business with Sorrento. Rubin Decl., Ex. 9. Although there appears to be some dispute as to whether Shapiro willingly ceased doing business with Sorrento, it is nevertheless undisputed that Shapiro did stop sending work to Sorrento while the dispute with Sorrento remained unresolved. *See* Rubin Decl., Ex. 11.

On June 3, 1997, defendants wrote in Spanish and English to UNITE-SW members at Sorrento in an effort to reassure them that "[d]espite the fact that the Union has a labor dispute with Sorrento, your union has not abandoned you." Rubin Decl., Ex. 10 at 25. On June 11, 1997, Simeon Prophet, one of the owners of Sorrento, distributed a memorandum to plaintiffs attaching a copy of defendants' above-described May 14, 1997 letter to Shapiro. *See* Rubin Decl., Ex. 13.

> several months ago and Sorrento Coats has now renounced its collective-bargaining relationship with UNITE after having engaged in a number of unfair labor practices designed to interfere with the right of Sorrento Coats' employees to bargain collectively through a representative of their own choosing. Accordingly, Sorrento Coats has forfeited its right to be one of your designated contractors.
>
> Consequently, UNITE hereby proposes that you cease doing business of the type discussed herein with Sorrento Coats.

Rubin. Decl., Ex. 8 at 18.

C. The Intra-union grievance process

On June 27, 1997, plaintiffs' counsel, Linda Klibanow, sent a letter to defendant Antonio Orea in his capacity as "manager" of UNITE-SW in which she complained about and sought redress for UNITE-SW's alleged breach of its duty of fair representation ("DFR") to her clients. *See* Rubin Decl., Ex. 18K at 176-78. In addition, she requested that UNITE-SW furnish her with copies of UNITE's governing documents, including UNITE's constitution and bylaws, as well as "all relevant documentation and forms pertaining to any available internal union remedies which my clients might pursue...." *Id.* at 177. On June 30, 1997, counsel for UNITE-SW, Laurence Zakson, replied to Klibanow's dune 27 letter, informing her that "[i]ndividual union members are entitled to a copy of the Union's governing documents." Rubin Decl., Ex. 18B at 180. Zakson further informed plaintiffs' counsel that the documentation would be made available "[u]pon receipt of a request signed by a [u]nion member in good standing employed at Sorrento Coats, Inc. ..." *Id.*

Shortly thereafter, on July 2, 1997, the district council's business agent, Roxana Guevara, received a letter from plaintiff Dalores Rowe requesting that the union's governing documents and a copy of the most recent CBA between UNITE-SW and Sorrento be sent to Klibanow. *See* Rubin Decl., Ex. 18C. In addition, Rowe stated that Klibanow's June 27, 1997 letter to Orea "should be considered [her] request for relief from [the union's] violation of my rights under federal labor law." *Id.* at 183. Guevara replied to Rowe on July i0, 1997, stating that the documents had been sent to her and that if she wanted the documents sent to her attorney, UNITE-SW would do so for the sum of $49.32 (30 cents per

page plus postage). Rubin Decl., Ex. 18G at 198. Guevara further informed Rowe that in order to file internal union charges, "[a petitioner] must abide by the Union Constitution. Letters that are incorrectly addressed or which lack statements of the parties against which they are filed will almost certainly be deemed insufficient to begin the hearing process." *Id.*

On July 2, 1997, in a letter to Zakson, Klibanow reiterated her demand for copies of UNITE's governing procedures and complained that "there can be no legitimate justification for [his] stated refusal to supply these documents to the designated agent of the employee/unit meters." Rubin Decl., Ex. 18D at 186. In this letter, Klibanow stated, in reference to "internal appeal procedures," that "if available, we wish hereby to invoke [them] immediately from your June 30, 1997 denial of requested relief." *Id.*

On July 7, 1997, defendants sent a copy of UNITE's governing documents and most recent CBA with Sorrento to plaintiffs Rowe, Maria Ramirez, and Tauni Simo. Rubin Decl., Ex. 18E. On the same date, Zakson informed Klibanow by letter that "[u]nion records indicate that none of these individuals is a member in good standing as defined in Article 14, Section 9 of the Union Constitution." Rubin Decl., Ex. 18F at 193. Zakson further noted that "internal union remedies cannot be invoked via a letter from an attorney to the attorney for a [union] affiliate." *Id.* at 194.

On July 29, 1997, Klibanow sent a letter to the Appeal Committee of UNITE's General Executive Board ("GEB"), at the District Council's address in Los Angeles. In this letter, Klibanow wrote that "[p]ursuant to Article 19, Section 13 of [the union's] Constitution (1995), [plaintiffs], employees of

Sorrento Coats, Inc. ("appellants"). . . hereby charge [the union's] Southwest District Council as set forth in their letter of June 27, 1997 to Antonio Ores, Manager . . . ." Rubin Decl., Ex. 181 at 259. Klibanow further wrote that "[the] District Council, by letter of June 30, 1997 of its attorneys ... denied appellants their requested relief." *Id.* Attached as an exhibit to her letter was a draft of the complaint subsequently filed in this Court, in September 1997.[6] Later, in an August 13, 1997 letter to Zakson, Klibanow referred to her July 29, 1997 letter as "charges filed . . . with the GEB Appeal Committee." Rubin Decl., Ex. 18K at 287. A copy of this letter was sent to general counsel for UNITE, Max Zimny. *See id.* at 288 In reply, Zimny informed Klibanow that "[c]harges under the UNITE constitution may be filed only by members of UNITE in good standing," and not "by an attorney or other representative." Rubin Decl., Ex. 18L at 290. Zimny added that, "under Article 20, Section 3 of the constitution, neither the accuser [n]or the accused may be represented at the hearing by any person other than a 'member in good standing but not an international officer of UNITE.'" *Id.* (citing UNITE constitution, Article 20, section 3). Accordingly, Zimny advised Klibanow that if the persons she represents "are members in good standing, please have them file the charges in their own names and they will be processed under the provisions of the UNITE constitution." *Id.*

On September 25, 1997, Zakson informed Zimny that none of the individuals who attempted to sign charges against

---

[6] The version of the complaint attached to the letter alleged a claim for relief only for breach of the DFR.

UNITE-SW were members in good standing pursuant to Article 14, Section 9 of the UNITE constitution. Rubin Decl., Ex. 180. According to dues records kept by UNITE-SW, these individuals had not paid their dues for at least six months; one had not paid for twenty-nine months. *Id.* In addition, three of the individuals attempting to bring charges against UNITE-SW had never been members of UNITE-SW.

Finally, on September 26, 1997, Zimny wrote to Klibanow to inform her that "unless you can contradict the facts set forth in the enclosed letter and convincingly demonstrate good standing membership status of the charging parties, the charges will not be processed by the Union." Rubin Decl., Ex. 18P at 299. Neither plaintiffs nor their counsel responded to this letter, nor did plaintiffs make any attempt to cure their dues arrears or otherwise reinstate their union membership for the purposes of pursuing any intra-union remedies.

D. <u>The instant action</u>

On September 30, 1997, plaintiffs filed a complaint in this Court. On January 30, 1998, plaintiffs filed a notice of voluntary dismissal of the case pursuant to Fed. K. Civ. P. 41(a) (1). On the same day, January 30, 1998, plaintiffs filed a complaint, alleging substantially the same claims that had been alleged in the initial federal action, in San Bernardino County Superior Court, seeking injunctive relief and damages for (1) breach of the DFR, (2) intentional infliction of emotional distress, (3) negligent infliction of emotional distress, (4) intentional interference with contractual relations, (5) intentional interference with prospective economic

advantage. Defendants timely removed the case to this Court on February 4, 1998.

By stipulation and order dated August 11, 1998, plaintiffs were deemed to have filed and served a First Amended Complaint on July 30, 1998. A Second Amended Complaint was filed *nunc pro tunc* as of January 25, 1999, pursuant to an order dated February 17, 1999. By order dated May 14, 1999, this Court 9ranted the defendants' motion to dismiss plaintiffs' state law claims for negligent infliction of emotional distress, intentional interference with contractual relations, and intentional interference with prospective economic advantage on federal preemption grounds. On June 1, 1999, plaintiffs filed a Third Amended Complaint ("TAC") in which they attempted to reassert claims that had previously been dismissed. By order dated August 16, 1999, this Court dismissed these reasserted state law claims. Accordingly, the only claims now before the Court are plaintiffs' claims for (1) breach of the DFR and (2) intentional infliction of emotional distress.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. *See* Fed. R. Cir. P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 888 (1990). *See also Celotex Corp.*, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. *See also Abromson v. American Pac. Corp.,* 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. *See Matshshita*, 475 U.S. at 587.

III. DISCUSSION

Defendants move for summary judgment on plaintiffs' two remaining claims: (1) the DFR claim, and (2) the intentional infliction of emotional distress claim. In addition, defendants claim that they are entitled to summary adjudication regarding plaintiffs' prayer for attorneys' fees.

A. Plaintiffs' Claim for Breach of Defendants' DFR

Defendants argue that summary judgment should be granted on plaintiffs' DFR claim because the statute of limitations bars plaintiffs' claims and, in any event, defendants have shown as a matter of law that plaintiffs have no valid DFR claim.

1. Statute of Limitations

DFR actions are governed by the six-month statute of limitations applicable to ULP claims for relief. *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 163-72 (1983); *See also Galindo v. Stoody,* 793 F.2d 1502, 1508 (9th Cir. 1986). Defendants assert that plaintiffs' DFR claim is time-barred because this suit was filed more than six months after the accrual of the claim.

Although the Court in *DelCostello* held that a DFR claim must be filed within six months of the action's accrual, the Court did not provide guidance in determining when a DFR claim accrues. *Galindo*, *supra*, 793 F.2d at 1509. In *Galindo*, the Ninth Circuit held that the DFR limitations period begins to run "when the employee discovers, or in the exercise of reasonable diligence, should have discovered the acts

constituting the alleged violation." *Id.* (citations and internal quotation marks omitted). However, the *Galindo* court also noted that "[a] reasoned analysis of the question of when a duty of fair representation claim accrues must focus on the context in which the claim arose." *Id.* The vast majority of DFR claims, the *Galindo* court continued, arise in the grievance procedure context: the employee claims that a union failed to process a grievance or mishandled its presentation of the employee's grievance in an arbitration proceeding. In such cases, the cause of action accrues when the employee learns or should have learned o[the union's failure to process the grievance or when the employee learns or should have learned of the arbitrator's award. *Id.* In cases where the DFR claim is not based on a union's processing of a grievance, as here, "[t]he question of accrual becomes more complex." *Id.*

Nevertheless, defendants argue that because the conduct giving rise to plaintiffs' DFR claim took place in mid-May 1997, and because plaintiffs knew, or should have known, of those events at that time, their DFR claim accrued at that time. The gravamen of plaintiffs' DFR claim against defendants is that the union violated plaintiffs' rights in their capacity as members of the bargaining unit when it engaged in secondary pressure and failed to comply with demands by plaintiffs' counsel that it cease such activity. TAC ¶¶ 14-18. It is undisputed that plaintiffs sought decertification of UNITE-SW in late April 1997, through their "We the People of Sorrento" petition; that Sorrento wrote UNITE-SW on May 12, 1997, formally withdrawing recognition of the union as the exclusive bargaining representative of Sorrento's workers; and that the UNITE-SW responded on May 14, 1997, by sending a letter to Shapiro, asking Shapiro to stop sending work to Sorrento. *See* TAC, ¶¶ 2, 10, 14. Thus,

defendants argue, plaintiffs' DFR claim accrued when they learned of UNITE-SW's letter to Shapiro. It appears from Simeon Prophet's June 11, 1997 letter to Sorrento Coats employees, which attached a copy of UNITE-SW's May 14, 1997 letter to Shapiro, that plaintiffs knew, or should have known, of defendants' alleged breach as of that date. *See* Rubin Decl., Ex. 13. In addition, defendants argue that the latest date that plaintiffs could assert that their claim accrued is June 27, 1997, the date when plaintiffs' counsel sent a letter to defendant Orea complaining of the union's alleged misconduct. TAC, ¶ 17. Even if this later date is the accrual point, defendants contend, plaintiffs' filing of their lawsuit on January 30, 1998, was outside the six-month limitations period.[7]

Plaintiffs respond that their claims are not barred by the statute of limitations. Plaintiffs argue that the limitations period was tolled while they were attempting to avail

---

[7] Plaintiffs contend that the filing of the earlier, similar lawsuit on September 30, 1997, operates to make the present suit timely. Plaintiffs assert that the instant suit may be tacked onto the earlier case Plaintiffs are incorrect. A voluntarily dismissed lawsuit does not toll the statute of limitations, even if the same claims are reasserted in a new lawsuit. *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959) (voluntary dismissal of action without prejudice under Fed, R. Cir. P. 41(a) leaves the situation the same as if the suit had never been brought); *See also Nelson v. Local 854 Dock Loaders*, 993 F.2d 496, 498 (5th Cir. 1993) (timely suit brought by employee in federal court against two local unions and his employer, which was dismissed without prejudice at request of employee so that he could file almost identical suit in state court, did not toll six-month statute of limitations for ULP actions under the National Labor Relations Act and *DelCostello*).

themselves of intraunion remedies. Further, plaintiffs claim that defendants' subsequent conduct during the period from May 12, 1997, through December 1998, when Sorrento filed for bankruptcy and closed its doors, constitutes a continuing violation of the DFR, placing the accrual date of plaintiffs' claim well after July 30, 1997, the last date on which the claim could have accrued for the instant case to have been timely filed. Because the Court finds that plaintiffs are entitled to avail themselves of the doctrine of equitable tolling, it is unnecessary to address the question of whether defendants' conduct constituted a continuing violation.

Plaintiffs argue that the statute of limitations was equitably tolled during the period in which they were seeking intraunion relief. In support of this position, plaintiffs rely on a Seventh Circuit case, *Frandsen v. Brotherhood of Ry., Airline, and S.S. Clerks*, 782 F.2d 674 (7th Cir. 1986), where the court considered whether the pursuit of intraunion remedies, even if ultimately futile, entitles an employee to equitable tolling on a DFR claim. Noting that there existed a "tension between policy and procedure" in DFR cases, the *Frandsen* court reviewed the policies "underlying the duty of fair representation and the two procedural rules that channel the resolution of claims," namely, the exhaustion of internal union remedies and the statute of limitations when claims can be brought. *Frandsen*, 782 F.2d at 678. The purpose of the exhaustion doctrine is to encourage private rather than judicial resolution of disputes, *id.* (citing *Clayton v. UAW*, 451 U.S. 679, 689 (1981)), whereas the purpose behind the six-month statue of limitations in a DFR case is a rapid resolution of labor disputes. *Id.* (citing *DelCostello, supra*, 462 U.S. at 168). "While these goals are not necessarily mutually exclusive, they appear to conflict when internal union

procedures take longer than six months." *Frandsen*, 782 F.2d at 678. Thus, when the employee pursues union procedures that extend beyond the six-month statute of limitations period and those procedures turn out to be futile, the employee is faced with a dilemma:

> If the employee does not exhaust internal union remedies, he can be certain that the defendant union will argue that this requires dismissal of the action. On the other hand, if the employee does pursue those remedies, he knows that the union will argue that exhaustion would have been futile, and therefore that the statute of limitations should not be tolled during the time it took the employee to exhaust. This is the "Catch 22" that [plaintiff] alleges he is caught in. Me argues that under the district court's holding, if Clayton doesn't get him, DelCostello will.

Frandsen, 782 F,2d at 681. The *Frandsen* court resolved this dilemma by holding that "the [six-month] statute of limitations is tolled by the pursuit of internal union remedies, even where those remedies are ultimately determined to have been futile." *Id.* Here, plaintiffs contend that because they sought to follow UNITE's grievance procedures in order to avoid dismissal for failure to exhaust internal union remedies under *Clayton*, the statute of limitations should be equitably tolled while they pursued those remedies.

Defendants contend that *Frandsen* is not consistent with Ninth Circuit law. Defendants argue that *Conley v. International Brotherhood of Electrical Workers, Local 639*, 810 F.2d 913 (9th Cir. 1987), and its progeny govern. In *Conley*, the court held that filing an NLRB action was

"merely optional" and did not toll the statute of limitations because "[e]quitable tolling is most appropriate when the plaintiff is required to avail himself of an alternate course of action as a precondition to suit." *Id.* at 915-16; *see also Harris v. Alumax Mill Products. Inc.*, 897 F.2d 400, 404 (9th Cir. 1990) (holding that the filing of a workers' compensation claim does not toll the statute of limitations because such "alternate course of action" is "merely optional"). Defendants thus argue that plaintiffs were not required to pursue intraunion remedies. Moreover, they claim that the union constitution does not even permit plaintiffs to invoke internal union remedies unless they are "members in good standing."

Defendants' arguments, however, do not take into account the Ninth Circuit's ruling in *Galindo, supra* in which the court adopted an analysis similar to that followed in *Frandsen*.[8] In *Galindo*, the court considered whether the availability of grievance procedures should toll the limitations period. 793 F.2d at 1509. The court relied on a Sixth Circuit case, *Adkins v. International Union of Electrical, Radio & Machine Workers*, 769 F.2d 330 (6th Cir. 1985), which had considered the issue and noted:

> The district court held here that, once the employees knew or should have known that a breach had

---

[8] *Conley* and *Harris* are not apposite because they address equitable tolling in cases where a litigant sought to invoke relief in different fora. The "optional" "alternate course of action" in *Conley* was an NLRB charge, whereas *Harris* involved a workers' compensation claim. These cases therefore do not address the issue of whether the pursuit of intraunion remedies tolls the statute of limitations on a DFR claim.

> occurred, their action accrued and the limitations period began to run, even if some possibility of nonjudicial enforcement remained. This rule would impel the swift filing of hybrid claims at the expense of nonjudicial resolution of those claims. Certainly, the typical hybrid claim is based on the union's failure to properly process a grievance, so nonjudicial enforcement has already failed. But where the union's alleged breach of duty is in a non-grievance context, as here, the employees' good-faith attempt to exhaust their contractual remedies will prevent the accrual of their action. To hold otherwise would undercut the national policy of favoring nonjudicial resolution of labor disputes. Although, as the jury found, here any attempt to use the grievance procedure in fact was futile, there was no accrual of the claim for the purposes of the limitation period so long as plaintiffs were making a valid, timely, and nonfrivolous attempt to pursue their contractual remedies in reasonable good faith.

Adkins, 769 F.2d at 336 (citations omitted). The *Galindo* court adopted the reasoning in *Frandsen* in stating: "[a]n employee should not be penalized for seeking to resolve his [or her] dispute through the grievance process before filing a suit in federal court." *Galindo*, 793 F.2d at 1510. Accordingly, the *Galindo* court held that "[a] fair representation claim not based on how [the union handles a grievance] is tolled while good faith attempts are made to resolve that claim through grievance procedures." *Id.*; *see also Shanks v. Northern California Cement Masons Joint Apprenticeship Training Committee,* No. C-93-0609 (MHP) 1993 WL 300063, *5-*6 (N.D. Cal. 1993). As described

above, on June 27, 1997, Klibanow wrote to Antonio Orea in his capacity as "manager" of UNITE-SW. Rubin Decl., Ex. 18A at 176-78. Thereafter, when it appeared that UNITE-SW's response to her letter was a "denial of requested relief," Klibanow sought to invoke "internal appeal procedures." Rubin Decl., Ex. 18D at 186; *see also* Rubin Decl., Ex. 18I and 18K. Plaintiffs contend that it was not until September 26, 1997, when Zimny informed Klibanow that the charges would not be processed by the union unless the plaintiffs were shown to be members in good standing, Robin Decl., Ex. 18P at 299, that plaintiffs definitively knew that relief was not available through the internal union procedures. It appears then that prior to September 26, 1997, plaintiffs were attempting to exhaust intraunion remedies as required by *Clayton*. Although the union argues that plaintiffs' counsel should have known that the intraunion remedies were futile once plaintiffs had obtained a copy of the union constitution,[9]

---

[9] Defendants rely on Footnote No. 5 in *Galindo* to support the proposition that plaintiffs are not entitled to equitable tolling the remedies sought by plaintiffs were not available through the on's internal grievance procedures. Footnote 5, which appears to .imit the tolling rule, states that: "[t]his [toiling] rule, of course, assumes that grievance procedures could result in the relief sought by the employee. Cf. *Acri v. International Association of Machinists*, 781 F.2d 1393, 1396, n.l (9th Cir. 1986)." *Galindo*, 793 F.2d at ISIO, n.5. explains that " [d]uty of fair representation claims relating to the negotiation of collective bargaining agreements or work rules are not subject to the requirement of exhaustion of administrative remedies (citations omitted)." *Acri*, 781 F.2d at 1396, n.l. Plaintiffs' DFR claim does not relate to the negotiation of collective bargaining agreements or work rules. Therefore, the exemption from exhaustion of administrative remedies as described in *Acri* does not apply to the to the claims at issue in the instant case.

there is no evidence in the record that shows that plaintiffs' pursuit of the intraunion procedures was not undertaken in good faith. At a minimum, plaintiffs' state of mind when attempting to exhaust intraunion remedies is an issue of material fact, the existence of which precludes the granting of summary judgment under Fed. R. Cir. P. 56. Therefore, the motion for summary judgment must be denied with regard to defendants" assertion that plaintiffs' claim is time-barred.

2. Merits of Plaintiffs' DFR Claim

The DFR is a judicially-fashioned obligation of a union, to employees in a bargaining unit it represents, to represent them fairly and without discrimination. *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1251 (2d Cir. 1970).

The doctrine of the DFR was originally developed by the Supreme Court in cases brought under the Railway Labor

---

Nevertheless, defendants interpret *Galindo* to prohibit equitable tolling in this case because the remedies sought by plaintiffs, *e.g.*, emotional distress damages, health benefits, and back pay, could not be obtained through the union grievance and appeals procedures set forth in the UNITE constitution. Moreover, defendants claim that plaintiffs were not entitled to invoke intraunion procedures because they are not "members in good standing" due either to their significant arrears in dues or to their nonmembership in the union. However, the tolling rule in *Galindo* specifically avoids the question of whether the intraunion remedies were futile, focusing instead on whether plaintiffs pursued those remedies in good faith. *Galindo*, 793 F.2d at 1510 ("A fair representation claim not based on how a grievance is presented to an arbitrator is tolled while good faith attempts are made to resolve that claim through grievance procedures").

Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"). These cases involved racial discrimination by unions. *See Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) (holding that, by imposing a racially discriminatory seniority system, a union representing a craft violated a duty implied in the RLA to protect equally the interests of the members of the craft; reversing holding of Alabama Supreme Court that RLA created no such duty); *Tunstall v. Locomotive Firemen*, 323 U.S. 210 (1944) (holding, in case involving racially discriminatory seniority system embodied in CBA, that the right not to be discriminated against by exclusive bargaining representative on the basis of race "is a federal right implied from the [RLA] and the policy which it has adopted"). The doctrine was first applied by the Supreme Court in a case brought under the NLRA in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

In the NLRA context, the DFR is based on the exclusivity under § 9(a) of the NLRA, 29 U.S.C. § 159(a), of the union as the bargaining agent of the meters of a bargaining unit.[10] *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); Huffman, 345 U.S. at 337. The Ninth Circuit has held that "[a] union's breach of the duty of fair representation constitutes an unfair labor practice in violation of section 8(b)(1)(A) of the [NLRA]", *Dycus v. NLRB,* 615 F.2d 820, 827 (9th Cir. 1980). Accordingly, the NLRB has jurisdiction over a DFR claim concurrent with that of the federal courts. *Id. See also Kling*

---

[10] Section 9(a) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining."

v. NLRB, 503 F.2d 1044, 1046 (9th Cir. 1975). A DFR claim may be brought by any employee in a bargaining unit, regardless of whether the employee is a member of the union. *See Steele, supra,* 323 U.S. at 194, 199-201 (duty of union not to discriminate against members of bargaining unit extended to African-American employees who were excluded from union membership on the basis of race); *Smith v. Local No. 25. Sheet Metal Workers Int'l Ass'n,* 500 F.2d 741, 749 (5th Cir. 1974) (holding that the DFR is owed to all employees in the bargaining unit, not only to union members); *Turner v. Air Transport Dispatchers' Ass'n,* 468 F.2d 297, 301 (4th Cir. 1972) (same). This also is a consequence of the union's status as the exclusive bargaining representative. *Smith,* 500 F.2d at 749.

According to the Supreme Court's definition of the duty in *Vaca, supra,* the union is obligated, because of its statutory status as exclusive bargaining representative, "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca,* 386 U.S. at 177. In *Air Line Pilots v. O'Neill,* 499 U.S. 65 (1991), the Court reaffirmed this definition, setting forth the "three components of the duty," *id.* at 76: the union breaches the duty "if its actions are arbitrary, discriminatory or in bad faith," *id.* at 67 (internal quotation marks and citation omitted). The Court further explained that there is a violation of the duty under the first component, arbitrariness, "only if in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness. . .as to be irrational." *Id.* at 67 (internal quotation marks and citation omitted). Thus, to survive a motion for summary judgment on a DFR claim, a

plaintiff must produce evidence giving rise to a triable question of material fact showing that the challenged conduct was irrational, discriminatory, or undertaken in had faith.

Plaintiffs set forth three theories in support of their claim that defendants breached the DFR. First, plaintiffs contend that the union breached the DFR by applying secondary pressure on Shapiro to induce Shapiro to stop supplying work to Sorrento in May 1997. Pls.' Opp'n Brief at 21-27. Next, plaintiffs contend that the union breached the DFR by refusing, in June 1997, to supply plaintiffs' counsel with a copy of the CBA between the union and Shapiro, *id.* at 27. Finally, plaintiffs contend that the union breached the DFR in the fall of 1998, when it made the dismissal of the instant lawsuit a condition of any new CBA between the union and Sorrento, *id.* at 28-29. The Court considers plaintiffs' three theories in turn below.

a. Secondary Pressure

Plaintiffs cite no cases in which it has been held that a union's use of secondary pressure intended to affect an employer that has withdrawn recognition of the union is, in and of itself, a breach of the union's DFR to the employer's employees. Moreover, as explained below, the mere application of secondary pressure intended to affect an employer that has withdrawn recognition of the union does not amount to a violation of the DFR as it has been defined by the Supreme Court, because such conduct is not, standing alone, irrational, discriminatory, or characterized by bad faith. *O'neill*, 499 U.S. at 67; *Vaca*, 386 U.S. at 177. It is not irrational because it functions to pressure the employer to reverse its decision to withdraw recognition of the union; it is

not discriminatory because it affects all the employees in the bargaining unit equally; and it is not characterized as being in bad faith because the use of secondary pressure, where it is not otherwise wrongful, is simply a means of placing statutorily-authorized economic pressure on the employer.

Furthermore, to hold that the application of secondary pressure, standing alone, violates the DFR under the circumstances of the instant case appears to conflict with the legislative policy set forth in the "garment industry proviso" in § 8(e) of the NLRA, 29 U.S.C. § 158(e). The garment industry proviso is an exception written into the NLRA's ban on secondary pressure set forth in § 8(e). Section 8(e) provides as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b) (4)(B) of this section the

> terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

29 U.S.C. § 158 (e). Although § 8 (e) establishes that secondary pressure by a union ordinarily is a ULP within the meaning of § 8 (b), the provisos contained therein set forth exceptions to this general rule for the construction and garment industries. In the case of the garment industry, the exception expressly pertains to secondary pressure by a union on a jobber not to do business with a contractor where the jobber and contractor perform parts of an integrated process of production. It is undisputed that Shapiro and Sorrento were respectively a jobber and contractor performing parts of an integrated process of production in the garment industry. *See* Pls.' Opp'n Brief at 25.

By its express terms, the garment industry proviso deals with ULPs, not with DFR violations.[11] Nevertheless, it would

---

[11] Defendants argue that the final clause in § 8(e) ("Provided further, that nothing in this subchapter shall prohibit the enforcement any [jobber's agreement]") establishes that a union's

be anomalous if the Court were to interpret a court-created doctrine as conflicting with and trumping a contrary policy expressed by Congress in a statute. It is generally recognized that, although derived from the union's exclusive-agent status under § 9(a), the particular requirements of the DFR have been judicially fashioned. *See O'neill, supra,* 499 U.S. at 76 (DFR is merely "grounded in" statute); *Vaca, supra*, 386 U.S. at 177 (same); *Humphrey v. Moore*, 375 U.S. 335, 360 (1964) (DFR is "implicit in" the NLRA); *Abrams, supra*, 434 F.2d at 1251 (DFR "has been judicially fashioned from" statutes); *see also* 2 Patrick Hardin, *The Developing Labor Law* at 1409 (3d ed. 1992). It is unlikely that Congress intended to create or allow DFR liability for an instance of secondary pressure which it exempted from ULP liability.

For these reasons, the union's action in applying secondary pressure to Shapiro was not, standing alone, a

---

action to enforce a jobber's agreement which requires a jobber to refuse to do business with a contractor cannot be a DFR violation because the DFR is based on the exclusivity provision of § 9(a); and § 9(a) is "in this subchapter." Because the Court concludes that defendants' secondary pressure did not constitute a violation of the DFR for the reasons set forth herein, it is unnecessary to consider this contention.

It is also unnecessary to consider the question, briefed at some length by the parties, of whether the preexisting jobber's agreement between Shapiro and Sorrento expressly permitted the secondary pressure here at issue. The union and Shapiro were permitted under § 8 (e) to make an agreement regarding secondary pressure, regardless of whether this agreement was contained in their CBA, or did not exist until the union requested that Shapiro stop sending work and Shapiro complied.

violation of its DFR. Plaintiffs appear to argue that even if this is so, defendants' secondary action violated the DFR because defendants carried it out in an irrational, discriminatory, or bad faith manner. Plaintiffs first contend that the individual defendants stated to the owner of Shapiro that the union was taking the secondary action "because of the 'illegal election' at Sorrento," Pls.'Opp'n Brief at 23. According to plaintiffs, the secondary action was "an obvious reference to the decertification efforts" of plaintiffs, and therefore shows a retaliatory motive. *Id.* The Court finds that this alleged admission by the union does not give rise to a triable question of material fact with respect to whether the union acted irrationally, discriminatorily, or in bad faith. It is undisputed that the union employed secondary pressure in response to the decertification petition, which the union claims was the result of Sorrento's ULP, This is not evidence of a breach of the DFR because it does not give rise to any inference of irrationality, discrimination or bad faith.

Plaintiffs also argue that the union could have initiated the secondary pressure earlier than it did, on the basis of Sorrento's refusal to sign a renewed CBA, before Sorrento withdrew recognition pursuant to the decertification petition. Pls.' Opp'n Brief. at 23. Plaintiffs claim that the fact that the union did not apply secondary pressure earlier shows that the union's real motivation was not to pressure Sorrento to desist from a ULP, but to punish Sorrento's employees. *Id.* There is no evidentiary basis for such an inference. Before decertification, the union had alleged one ULP upon which secondary pressure could rationally be based--the alleged bad faith refusal to sign the renewed CBA. After decertification, the union had two rational bases for applying secondary pressure. The addition of a second basis did not render the

union's decision to apply secondary pressure a breach of the DFR.

Plaintiffs also contend that the there is evidence of bad faith on the union's part in "defendants' concealment of their role in removing" the Shapiro work from Sorrento. Pls' Opp'n Brief at 25. Such concealment, plaintiffs argue, shows that defendants' motive in applying secondary pressure was to drive Sorrento out of business and to punish employees, not to obtain continued recognition and a new CBA. *Id.* Plaintiffs refer to "ample evidence" of such concealment, in the form of omissions and misrepresentations, but plaintiffs' brief contains no citations to such evidence in the record. *Id.* at 25-26. Nor does an examination of plaintiffs' Separate Statement of Controverted and Uncontroverted Facts reveal any such evidence. There is an assertion in the Separate Statement that plaintiffs "affirmatively denied their exercise of discretion to remove the work," Pls,' Sep. Stmt. at 42 ¶ 17, but this appears merely to refer to Antonio Orea's alleged statement to Roxana Guevara that he believed the union was in some way required to apply secondary pressure to Sorrento. *See id.* The essence of plaintiffs" claim of concealment appears to be simply that "[t]he Union never told the Sorrento employees that it was the Union who pulled the work," *Id.* It is undisputed, however, that plaintiffs learned of the withdrawal of the Shapiro work at the union's insistence shortly after the union's letter to Shapiro requesting the withdrawal on May 14, 1997. *Id.* at 7 ¶ 20. Further, it is undisputed that plaintiffs received a copy of this when Simeon Prophet distributed a memo to all Sorrento employees, attaching the May 14, 1997, letter. *Id.* at 7 ¶ 21. Defendants cannot be held to have "concealed" from plaintiffs what plaintiffs already knew.

Plaintiffs next argue that defendants' arbitrariness and bad faith are shown by defendants' decision to use secondary pressure without "consultation with the plaintiffs or consideration of their interests. . . ." Pls.' Opp'n Brief at 26. In light of the Court's conclusion that the application of secondary pressure was not in itself a violation of the DFR, it cannot be said that a failure to consult with employees who would be adversely affected by such pressure was a violation of the DFR.

For all the reasons stated above, the Court concludes that plaintiffs have not sustained their burden of indicating portions of the record which give rise to triable questions of fact with respect to their contention that defendants breached the DFR by their actions in applying secondary pressure to influence Sorrento.

b. <u>Refusal to Provide Copy of CBA Between Union and Shapiro</u>

Plaintiffs contend that they "were entitled to a copy of any collective bargaining agreement that defendants held with another employer if that agreement impacted upon the plaintiffs," Pls. Opp'n Brief at 27, and that the union refused to provide plaintiffs a copy of the Shapiro CBA. The Court concludes that even if such conduct occurred, it is immaterial. As noted in footnote 11 above, the union's right to employ secondary pressure need not have been supported by the preexisting jobber's agreement between the union and Shapiro. Because Shapiro and Sorrento were related as a jobber and contractor in an integrated system of production, the union was entitled to make an agreement with Shapiro to apply secondary pressure to influence Sorrento. As a result,

there is no triable question of fact with respect to a DFR claim based on refusal to provide the Shapiro CBA.

c. Union's Alleged Requirement that Sorrento Secure Dismissal of the Instant Case

Plaintiffs allege that defendants conditioned their assent to a renewed CBA with Sorrento on Sorrento's securing or attempting to secure the dismissal of this case. Defendants deny having made such a demand. Assuming that there is a genuine factual dispute regarding this alleged demand, the Court nevertheless concludes that, if established, it would not constitute a violation of the DFR. Defendants have contended throughout this litigation that Sorrento was involved in the instigation of this lawsuit, in violation of § 101(a)(4) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a) (4). There is no evidence in the record that the union has advanced this position in bad faith. Plaintiffs cite no authority in support of the proposition that a union breaches the DFR by attempting in the course of CBA negotiations to secure dismissal of a lawsuit brought against it by members of a bargaining unit which it believes to be employer-sponsored. Instead, plaintiffs cite NLRB decisions in which it was held to be a ULP to condition access to a union hiring hall on employees' refraining from suing or bringing ULP charges against the union. *See Construction & General Laborers, Local No. 304,* 265 N.L.R.B. 602 (1982); *Local 45, International Association Of Bridge, Structural & Ornamental Iron Workers*, 320 N.L.R.B. 1079 (1996). These cases do not support plaintiffs' position in this case. Plaintiffs also cite *Daniels v. Pipefitters Ass'n Local Union No. 597,* 945 F.2d 906 (7th Cir. 1991), involving a union's DFR breach based on racial discrimination in the operation of a

hiring hall and in the processing of grievances. *Daniels* has no bearing on the issues presented in this case. Plaintiffs have not raised a triable issue of fact with respect to whether the union breached the DFR by demanding Sorrento's cooperation in seeking dismissal of this case.

In summary, plaintiffs have not raised triable issues of fact which could establish that the union acted with "ill will, prejudice or deliberate bad faith," or engaged in "unintentional conduct so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary," as is required to prevail on a DFR claim, *Price v. Southern Pac. Transp. Co*, 586 F.2d 750, 754 (9th Cir. 1978) (citation and internal quotation marks omitted), *overruled on other grounds by DelCostello, supra*. Defendants' motion for summary judgment is therefore granted on the merits of plaintiffs' DFR claim.

B. Plaintiffs' Claim of Intentional Infliction of Emotional Distress

The second claim for relief alleged in the TAC is brought for intentional infliction of emotional distress. The TAC sets forth the following factual allegations as a basis for this claim:

> Outrageous acts committed by defendants include, but are not limited to: threatening employees with loss of work and livelihood unless and until they submitted to UNITE-SW's coercion in the exercise of their Section 7 rights no longer to be represented by UNITE-SW; causing the termination of plaintiffs' health care coverage; "visiting" employees in their homes

> uninvited and unannounced to interrogate them as to the reasons for the exercise of their Section 7 rights; threatening that "the war has just begun," against a backdrop of a history of union violence, including slashed tires, broken windows, actual violence against the president of Sorrento and threats of further violence against the president of Sorrento and his wife; threatening plaintiffs that if they don't shut up, defendants will find someone to silence them; and threatening that unless they desist from pursuing their civil rights, plaintiffs "will go to jail."

TAC, ¶ 47.

Plaintiffs' claims of intentional infliction of emotional distress are based on three distinct sets of allegations: (1) that defendants applied secondary pressure to Sorrento through Shapiro, resulting in loss of work to plaintiffs; (2) that defendants terminated or threatened to terminate plaintiffs' health insurance; and (3) that defendants' employees subjected individual plaintiffs to intimidation, humiliation, and threats. Defendants argue that claims of intentional infliction of emotional distress based on any of these allegations are preempted by federal labor law, and that summary judgment must therefore be granted in defendants' favor on these claims. This argument is considered below with respect to each of the three sets of allegations.

1. <u>Secondary Pressure</u>

As noted above, it is undisputed that defendants sought to pressure Sorrento by inducing Shapiro to refuse to supply Sorrento with orders for work. Plaintiffs argue that this was

extreme and outrageous conduct, sufficient to support a claim of intentional infliction of emotional distress. Defendants argue that this state tort claim is preempted by federal labor law regulating secondary pressure.

In *Building Trades Council (San Diego) v. Garmon*, 359 U.S. 236 (1959), the Supreme Court held that the NLRA preempts state regulation of conduct arguably protected or arguably prohibited by the Act. If conduct "is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced." *Id.* at 246. It is clear that defendants' conduct in securing Shapiro's refusal to send work to Sorrento is arguably within the compass of § 8(e) of the NLRA. Thus, plaintiffs' state-law claim of intentional infliction of emotional distress, insofar as it is based on this conduct, is preempted by the NLRA.

State law claims may also be preempted by the federal law governing the DFR. In *Carter v. Smith Pood King*, 765 F.2d 916 (9th Cir. 1985), the plaintiff brought a DFR claim and an intentional infliction of emotional distress claim, among others, based upon the same set of facts. The court held that a triable question of fact existed with respect to the DFR claim, *id.* at 920, but that the intentional infliction of emotional distress claim was preempted by federal law establishing the DFR, *id.* at 921. The court stated that "the tort claim[]. . . arose out of the same acts and conduct which formed the basis of Carter's . . breach of duty [of fair representation] claim[], and [is] thus preempted by federal labor law." *Id.* The same reasoning applies in the instant case. Plaintiffs' conduct in inducing Shapiro's refusal to send work to Sorrento is the basis of defendants' DFR claim; as a result,

plaintiffs cannot advance a state-law tort claim based on the same conduct.

2. Health Insurance

Yet another type of preemption applies to plaintiffs' claim of intentional infliction of emotional distress insofar as it is based on defendants' alleged conduct in threatening to terminate or terminating plaintiffs' union group health insurance. In *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988), the court stated that § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), "preempts all state-law causes of action evaluation of which requires interpretation of a labor contract's terms." *Id.* at 545. This is so even with respect to state-law-based tort claims, as opposed to contract claims, if the evaluation of such tort claims requires consideration of the terms of a CBA. *Id.* In the instant case, the question of whether it was outrageous conduct to "threaten" to terminate employees' union group health insurance benefits, or to terminate such benefits, based on the employees' efforts to decertify UNITE-SW, depends in part on whether or not employees in a unit that has taken such action are entitled to continue to receive such benefits by the terms of their CBA. Plaintiffs have not disputed defendants' contention that the Sorrento CBA must be construed in order to determine whether or not plaintiffs were entitled to continue receiving health insurance benefits. Therefore, insofar as plaintiffs' claim of intentional infliction of emotional distress is based on the health insurance issue, plaintiffs' claim is preempted by § 301.

3. Other Conduct

Plaintiffs' claims of humiliating, intimidating and harassing conduct implicate other concerns with respect to preemption than those related to the claims discussed above. Federal labor law preemption of state-law claims ends "where the State has a substantial interest regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Broth. of Carpenters. Local 25*, 430 U.S. 290, 302 (1977). Therefore, for example, a union member's intentional infliction of emotional distress claim against a union was held to be preempted insofar as it was based on defendants' denial of job referrals to the member, but not insofar as it was based on alleged harassment of the member. *Id.* at 304. Even though a ULP proceeding could have been brought before the NLRB based on alleged harassment, the Board's concern would be with the effect of the harassing conduct on the employment relationship, not with "[w]hether the [allegedly harassing] statements or conduct of the respondents also caused [the member] severe emotional distress." *Id. See also Hayden v. Reickerd*, 957 F.2d 1506, 1512 (9th Cir. 1991) (interpreting *Garmon, supra*, to mean that conduct "marked by violence and imminent threats to the public order" may be regulated by states since it is of "peripheral concern" to the LMRA or involves "interests . . . deeply rooted in local feeling and responsibility"); *Sever v. Alaska Pulp Corp.*, 97B F.2d 1529, 154041 (9th Cir. 1992) (interference with contractual relations, interference with prospective contractual relations, and negligent and intentional infliction of emotional distress claims not preempted where they arise from conduct not covered by the collective bargaining agreement; state's interests prevail over federal);

C&W Construction Co. v. Brotherhood of Carpenters and Joiners, 687 F. Supp. 1453, 1472 (D. Haw. 1988) (interference with prospective economic advantage claim not preempted where threats of violence are alleged; under *Farmer* test, no preemption of claim based on conduct "unrelated to the federal claim" or performed in a "particularly abusive manner").

Thus, claims based on conduct otherwise satisfying the criteria of intentional infliction of emotional distress and not implicating the central labor-relations concerns of the federal regulatory scheme are not preempted by federal law, The Court therefore concludes that plaintiffs' claims of intentional infliction of emotional distress are not preempted by federal law to the extent that they are based on allegedly humiliating, intimidating and harassing conduct.

Defendants argue that even if such claims are not preempted, summary judgment should nevertheless be granted, because plaintiffs have not raised triable questions of fact sufficient to survive summary judgment with respect intentional infliction of emotional distress based on the allegedly humiliating, intimidating and harassing conduct under state law. The Court will therefore consider plaintiffs' evidence relevant to the elements of intentional infliction of emotional distress to determine whether there are triable issues of material fact with respect to this claim. Discovery has been completed in this case, and plaintiffs have the burden of pointing out evidence in the record sufficient to false material questions of disputed fact with respect to each element of intentional infliction of emotional distress for each plaintiff claiming to have suffered this tort. *See Celotex, supra*, 477 U.S. at 322. "The elements of a cause of action

[under California law] for intentional infliction of emotional distress are (1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering, and (4) actual and proximate causation of the emotional distress." *Molko v. Holy Spirit Ass'n*, 66 Cal. 3d 1092, 1120 (1988), *superseded by statute on other grounds as noted in Scheiding v. Dinwiddie Construction Co.*, 69 Cal. App. 4th 64, 70-73 (1999). *See also Agarwal v. Johnson*, 25 Cal. 3d 932, 946 (1979), overruled on other grounds by *White v. Ultramar*, 21 Cal. 4th 563 (1999). For the reasons stated above, such material questions of disputed fact must be based on evidence of conduct other than defendants' request that Shapiro cease sending work to Sorrento or the alleged threats of termination of health insurance.

Plaintiffs Fernandez, Gomez, Hadley, Kanai, Maya, Olivas, Pak, Peraza, Rowe and Villegas stipulated on March 29, 2000, to the dismissal with prejudice of their intentional infliction of emotional distress claims. Defs.' Stmt. of Uncontroverted Facts ¶ 64; Pls.' Sep. Stmt. of Controverted and Uncontroverted Facts ¶ 64. Thus, to survive summary judgment, plaintiffs must produce evidence sufficient to raise triable questions of fact with respect to at least one of the fifteen remaining plaintiffs, Aguirre, Clark, DeLeon, Garcia, Godina, A. Gonzales, L. Gonzales, Kim, Madrigal, Osorio, Perez, Ramirez, Simo, Uribe, and Wilson-Sloan.

Defendants contend that the evidence in the record does not suffice to raise triable questions of fact with respect to any of these fifteen plaintiffs. Defs.' Mot. for Summ. J. at 22. Plaintiffs respond with citations to the depositions of these plaintiffs, Pls.' Sep. Stmt. of Controverted and

Uncontroverted Facts ¶ 65-92. The Court concludes that this testimony fails to raise a triable issue of fact, as to any of the fifteen plaintiffs, with respect to the first element of intentional infliction of emotional distress set forth in *Molko* and *Agarwal, supra*, namely, the existence of outrageous conduct within the of California law.

The testimony plaintiffs cite pertaining to purportedly outrageous conduct falls into seven factual clusters. First, nine plaintiffs testified that they heard remarks by Leovigilda Romero that they considered offensive.[12] Romero was a Sorrento employee and was at one time a union shop steward at Sorrento. Specifically, Romero directed personal insults at some plaintiffs,[13] asserted that plaintiffs would go to jail,[14] and threatened to report some plaintiffs to the Immigration and Naturalization Service,[15] on one occasion using a racial slur.[16]

---

[12] Clark Depo. at 84:16-24; DeLeon Depo. at 235:13-22, 266:8-16; Garcia Depo. at 97:23; Godina Depo. at 251:16-20; A. Gonzalez Depo. at 116:4-7; L. Gonzalez Depo. at 97:17-23; Madrigal Depo. at 211:10-25; Osorio Depo. at 153:3-24; Simo Depo. at 305:23 to 306:5

[13] DeLeon Depo. at 235:13-22.

[14] Clark Depo. at 84:16-24; DeLeon Depo. at 235:13-22; A. Gonzales Depo. at 114:4-7; L. Gonzales Depo. at 97:17-23; Simo Depo. at 305:23 to 306:5

[15] Osorio Depo. at 153:3-24.

[16] DeLeon Depo. at 266:8-16.

One plaintiff testified that Romero made an obscene gesture at her.[17]

The second cluster of facts pertains to statements by Roxana Guevara. Guevara was a union employee. Nine plaintiffs testified regarding offensive remarks by Guevara. According to several plaintiffs, Guevara asserted, in profane terms, that plaintiffs would suffer economically without the union.[18] Plaintiffs also testified that Guevara made threats to call the Immigration and Naturalization Service,[19] and called plaintiffs insulting names because of their efforts to decertify the union.[20]

A third category of testimony pertains to Antonio Orea, a union employee, Three plaintiffs testified regarding offensive statements by Orea. Orea purportedly said at a meeting of employees that plaintiffs would regret their action to decertify the union, and that the union would react against this action.[21]

---

[17] Madrigal Depo. at 211:10-25.

[18] Clark Depo. at 101:3 to 102:21; DeLeon Depo. at 78:1-6, 80:14-20; 92:5-7, 96:9-11; Garcia Depo. at 86:20-22; A. Gonzales Depo. at 104:18; Perez Depo. at 73:22 to 74:19 Simo Depo. at 304:11-16; Uribe Depo. at 103:19-23.

[19] A. Gonzales Depo. at 116:1-2.

[20] Simo Depo. at 304:11-16.

[21] Perez Depo. at 274:11 to 275:9; Ramirez Depo. at 274:11-21; Simo Depo. at 206:4-19.

Fourth, seven plaintiffs testified that someone placed flowers at the entrances of Sorrento's plant.[22] It appears that plaintiffs regarded the placement of the flowers as threatening, because they understood the flowers as a symbol "that something was going to happen to someone or someone was going to die."[23] Some plaintiffs believed that union representatives placed the flowers,[24] while others stated that they did not know who placed them.[25]

Fifth, two plaintiffs testified that on a certain occasion union supporters gathered at or near Sorrento and sang or played a song called "Cardboard Houses."[26] As one plaintiff explained, this song "is about poor children who are sick and starving and who live in cardboard houses"[27]; evidently plaintiffs viewed the song as pertaining to economic hardships they might suffer.[28]

---

[22] Clark Depo. at 72:13; DeLeon Depo. at 110:20-22; L. Gonzales Depo. at 111:16-21; Kim Depo. at 55:18-21; Osorio Depo. at 157:8-9; Simo Depo. at 308:14 to 310:20.

[23] L. Gonzales Depo. at 111:16-21.

[24] Clark Depo. at 112:18 to 113:3.

[25] L. Gonzales Depo. at 112:18 to 113:3.

[26] Godina Depo. at 246:18 to 247:19; Uribe Depo. at 141:9-21.

[27] Godina Depo. at 246:18 to 247:19.

[28] *Id.*

Sixth, six plaintiffs made reference to events that occurred during a 1990 strike against Sorrento. These events included union supporters shoving, insulting and threatening plaintiffs, pelting plaintiffs with eggs, hitting cars with picket signs, and vandalizing and burglarizing cars.[29]

Finally, one plaintiff testified that on two occasions, union supporters she did not know came to her house and screamed her name until she came outside to talk to them.[30]

Upon considering the testimony proffered by plaintiffs, the Court concludes that plaintiffs have not sustained their burden on summary Judgment. None of the conduct described by the deponents rises to the level of outrageousness required to allege a prima facie case of intentional infliction of emotional distress.[31] Conduct attains this level when it "'exceed[s] all bounds [of decency] usually tolerated by a decent society, [and is] of a nature which is especially calculated to cause, and does cause, mental distress.'" *Cole*

---

[29] Aguirre Depo. at 195:3 to 198:25; DeLeon Depo. at 37:16-23; Garcia Depo. at 53:2-9; L. Gonzales Depo. at 47:8-18; Kim Depo. at 51:24; Ramirez Depo. at 73:5-24.

[30] A. Gonzales Depo. at 71:1-25; 73:9-25.

[31] Guevara's remarks regarding the economic hardship plaintiff experience without the union appear, from all the plaintiffs' testimony, to refer to the results of decertification of the union and of work due to secondary pressure by the union; a tort claim on such conduct is preempted for the reasons set forth above. And claims about violence and intimidation associated with the 1990 strike too remote in time to give rise to triable questions regarding the emotional distress claims in this lawsuit.

v. Fair Oaks Fire Protection Dist., 43 Cal.3d 148, 155 n.7 (1987) (quoting *Restatement (Second) of Torts* § 46, cmt. d). Liability "'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" *Molko, supra*, 46 Cal. 3d at 1122 (quoting *Restatement (Second) of Torts* § 46, cmt. d). In *Farmer, supra*, in which California law was applied to a claim for intentional infliction of emotional distress, the Supreme Court stressed that the contentious context of labor relations may affect the determination of what conduct is extreme and outrageous within the meaning of California law. The Court stated that "[t]he potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts." 430 U.S. at 305-06. In light of this, "mere insults, indignities, threats, annoyances and petty oppressions" are terms that better describe the conduct plaintiffs testified to than "conduct exceeding all bounds usually tolerated by a decent society." Consequently, plaintiffs have not sustained their burden on summary judgment of indicating evidence in the record that gives rise to a triable issue of fact regarding the existence of outrageous conduct.

For all the reasons stated above, the Court grants defendants' motion for summary judgment on the second claim for relief in the TAC.

C. **Plaintiffs' Prayer for Attorneys' Fees**

Because the Court grants summary judgment in favor of defendants, plaintiffs are not prevailing parties and therefore may not recover attorneys' fees.

IV. CONCLUSION

For all the foregoing reasons, defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Date: April 20, 2001

/s/ _____
CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-55673
D.C. No. CV-98-00840-CAS

[Filed January 16, 2003]

Tauni Simo; Dalores Rowe; Maria Ramirez; Petra Villegas; Petra Deleon; Candy Fernandez; Gabriella Uribe; Angelina Perez; Maria Clark; Lourdes Gonzalez; Vilma Garcia; Dolores Olivas; Maria Osorio; Silvie Madrigal; Ana Gonzales; Maria Aguirre; Mariana Godina; Lidia Peraza; Chong Suk Kim; Claristine Hadley; Yong Hui Pak; Teresa Gomez; Noemi Maya; Teresa Wilson Sloan; Miyako Kanai,
Plaintiffs-Appellants,

v.

Union of Needletrades, Industrial & Textile Employees, Southwest District Council; Union of Needletrades, Industrial & Textile Employees, AFL-CIO; Antonio Orea; Roxana Guevara,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

JUDGES: Before: Dorothy W. Nelson and Thomas G. Nelson, Circuit Judges, and William W. Schwarzer,* Senior District Judge.

MEMORANDUM**

Following a grant of summary judgment to appellees, the district court taxed costs to appellants in the amount of $66,902.88. Appellants moved to re-tax costs. The district court denied the motion to re-tax, which denial is the subject of this appeal; we affirm.

Federal Rule of Civil Procedure 54(d)(1) provides that costs "shall be allowed as of course to the prevailing party unless the court otherwise directs." Although the rule creates a "presumption in favor of taxing costs to the losing party," the district court has discretion to re-tax costs, and the court of appeals "review[s] the district court's denial of a motion to re-tax costs for an abuse of discretion." *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9th Cir. 1999).

We have found an abuse of discretion only where the district court has failed to consider important factors bearing

---

* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

upon the question of whether to re-tax costs. *Id.* In this case, the district court considered, and rejected, appellants' arguments that re-taxing was justified due to: 1) the economic disparity between the union and the allegedly indigent workers;[1] 2) allegations that the union had needlessly increased costs associated with depositions; and 3) the closeness, complexity, and public importance of the issues in this case. The district court did not abuse its discretion in its consideration of these factors.

Although not mentioned in its order, the district court also rejected, in the hearing on the motion to re-tax, appellants' argument that this lawsuit was civil rights litigation. The district court did not abuse its discretion in failing to take into consideration civil rights concerns because it correctly concluded that the underlying claims in this case are not civil rights claims.

In its analysis of the appellants' indigence, the district court considered the fact that the appellants had been assisted by a nonprofit organization, which had provided some funding for their lawsuit. We do not approve of this analysis; the district court's decision on whether to re-tax costs should be based on the parties' own financial resources. Nonetheless, we find no abuse of discretion here. The district court clearly recognized the economic disparity between the parties, even assuming that the appellants were being helped by an organization. The district court therefore adequately

---

[1] Although there is unquestionably a disparity between the economic situation of the workers and the union, only six of the twenty-five appellants submitted affidavits of indigency.

considered the appellants' financial situation, and under such circumstances no abuse of discretion is evident.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-98-00840 CAS (CTx)

[Filed March 20, 2002]

TAUNI SIMO, et al.	)
	)
v.	)
	)
UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES, SOUTHWEST DISTRICT COUNCIL, et al.	)

PRESIDING: HONORABLE CHRISTINA A. SNYDER, U.S. DISTRICT JUDGE

Maynor Galvez, Deputy Clerk

MINUTE ORDER

PROCEEDINGS: **MOTION TO RETAX COSTS**
(filed on May 25, 2001)

Following this Court's entry of summary judgment for defendants on April 23, 2001, the Clerk taxed costs against plaintiffs in the amount of $23,815.08 for defendants Antonio Orea, Roxana Guevara, and UNITE-SW and in the amount of

$43,087.80 for defendant UNITE. On May 25, 2001, plaintiffs filed a motion to retax costs, arguing that (1) defendants unnecessarily increased court reporter and interpreter costs in connection with their conduct of depositions of plaintiffs, (2) the payment of the costs would render plaintiffs indigent, (3) the granting of defendants' application will have a serious and substantial chilling effect on enforcement of civil rights, and (4) even if plaintiffs did not prevail in this action, their claims were not without merit because the case involved close and difficult issues of substantial public importance. Plaintiffs also submit that, given the pending appeal filed on May 10, 2001, the Court should defer consideration of defendants' costs until the Ninth Circuit has ruled on their appeal.

Fed. R. Civ. P. 54 (d) (1) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs...." Thus, Rule 54 (d) creates a presumption in favor of awarding costs to prevailing parties, but vests in the district court discretion to refuse to award costs. *Association of Mexican-American Educators v. State of California*, 231 F.3d 572, 591 (9th Cir. 2000) (*"AMAE"); Stanley v. University of Southern California*, 178 F.3d 1069 (9th Cir. 1999). If the court denies costs, it is required to "explain why [the] case is not 'ordinary' and why, in the circumstances, it would be inappropriate or inequitable to award costs." *AMAE* at 593. Because of the Rule 54 (d) presumption in favor of awarding costs to the prevailing party, the losing party bears the burden of demonstrating why costs should not be taxed. *National Info. Servs., Inc. v. TRW, Inc.*, 51 F.3d 1470, 1471-72 (9th Cir. 1995) (*abrogated on other grounds in AMAE*, 231 F.3d at 593).

The Court finds that plaintiffs have not met their burden of demonstrating why costs should not be taxed to them as the losing parties. Although plaintiffs argue that the economic disparity between UNITE and the plaintiffs militates against taxing costs, indigency of the losing party is insufficient by itself to justify denying costs to the prevailing party. *See* 28 U.S.C. § 1915 (f) (1) (costs may be rendered against parties proceeding *in forma pauperis*); *In re Paoli R.R. Yard PCB Litigation*, 221 F.3d 449, 464 (3d Cir. 2000) (collecting cases). Furthermore, when a claim of poverty is made under 28 U.S.C. § 1915 "it is proper and indeed essential for the supporting affidavits to state the facts as to affiant's poverty with some particularity, definiteness and certainty." *Unites States v. McQuade*, 647 F.2d 938, 939 (9th Cir. 1981). Hee, only six of twenty-six named plaintiffs have filed motions and affidavits pursuant 28 U.S.C. § 1915 in order to proceed with their appeal *in forma pauperis*. *See* Pls.' Mot., 217-28. Because these applications do not establish the indigency of the remaining twenty plaintiffs, plaintiffs collectively have not made a proper claim of indigency. Moreover, the record shows that plaintiffs received legal, financial and moral support from the Pacific Justice Institute in this matter. Bahan Decl., Exs. A-D. Accordingly, absent any evidence that these plaintiffs have agreed to bear their own costs, plaintiffs' claim of economic disparity as a basis for avoiding costs of their lawsuit is unavailing.

With respect to plaintiffs' claim that defendants unnecessarily increased court reporter and interpreter costs in connection with their conduct of depositions of plaintiffs, it appears that the questions asked at plaintiffs' depositions were necessary to the proper defense of this case. Recoverable costs include "the original and one copy of the

transcription...of all depositions used *for any purpose* in connection with the case." Local Rule 16.4.6 (emphasis added); *see also* 28 U.S.C. § 1920 (2). Plaintiffs nonetheless object to defendants' questions regarding their mental state and personal lives, as well as questions regarding their work duties and pay. However, such questions are clearly germane to the defense of plaintiffs' claims for emotional distress and economic damages. Further, it appears that because Sorrento's owner, Simeon Prophet, failed to produce plaintiffs' payroll records despite a defense subpoena, defendants' counsel was obligated to ask plaintiffs numerous questions concerning the hours they worked, the tasks they performed, and the amounts they were paid, in order to estimate their front and back pay. Bahan Decl., ¶ 4. In any event, it is clear from the parties' submissions at summary judgment, that they used the transcripts of depositions to support their asserted positions. Thus, plaintiffs' argument that the depositions and interpreter costs were unnecessary also fails.

Finally, plaintiffs' arguments regarding the "closeness" or "complexity" of the issues and the purported "public interest" nature of the litigation are not persuasive. While the plaintiffs prevailed at summary judgment on the statute of limitations issue, defendants were clearly the prevailing party; the Court would not consider this to be a "close" case. Thus, the Court concludes that plaintiffs have not overcome the Rule 54 (d) presumption that the defendants as prevailing party should receive their costs of suit. Accordingly, plaintiffs' motion to retax costs is DENIED.

In view of the fact that defendants have not disputed the propriety of deferring the taxation of costs until a final

disposition on appeal, the Court hereby STAYS the award pending such disposition.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-98-00840 CAS (JGx)

[Filed May 14, 1999]

TAUNI SIMO, et al.	)
	)
Plaintiffs,	)
	)
v.	)
	)
UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES, SOUTHWEST DISTRICT COUNCIL, et al.	)
	)
Defendants	)

MINUTE ORDER

PROCEEDINGS: Defendants' Motion to Dismiss

I. Introduction

On April 22, 1998, this Court issued its order ("April 1998 Order") denying plaintiffs' motion to remand and denying defendants' motion to dismiss. Plaintiffs filed a

Second Amended Complaint ("SAC") on January 25, 1999.[1] The SAC includes the following claims: (1) Breach of the Duty of Fair Representation, against Union of Neddletrades, Industrial & Textile Employees ("UNITE") and UNITE, Southwest District Council ("UNITE-SW"); (2) Intentional Infliction of Emotional Distress, against UNITE-SW, UNITE, Antonio Orea and Roxana Guevara; (3) Negligent Infliction of Emotional Distress, against UNITE-SW and UNITE; (4) Intentional Interference with Contractual Relations, against UNITE-SW, UNITE, Antonio Orea and Steve Nutter; (5) Intentional Interference with Prospective Economic Advantage, against UNITE-SE, UNITE, Antonio Orea and Steve Nutter.

Defendants bring the instant motion to dismiss the first, third, fourth and fifth claims for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6).

II. Standard for a Motion to Dismiss

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. A court must not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

---

[1] Plaintiffs named in the SAC are: Tauni Simo, Dalores Rowe, Maria Ramirez, Petra Villegas, Petra Deleon, Candy Fernandez, Gabriela Uribe, Angelina Perez, Maria Clark, Lourdes Gonzalez, Vilma Garcia, Dolores Olivas, Maria Osorio, Silvie Madrigal, Ana Gonzales, Maria Guirre, Mariana Godina, Lidia Peraza, Chong Suk Kim, Claristine Hadley, Teresa Wilson Sloan, Miyako Kanai, Yong Hul Pak, Teresa Gomez, and Noemi Maya.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996).

In a motion pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Cahill, 80 F.3d at 338; NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). The complaint must be read in the light most favorable to the plaintiff. Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980). However, a court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. Western Mining Council v. Watt, 642 F.2d 618, 624 (9th Cir. 1981).

Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

Furthermore, unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1991). A court may, however, consider exhibits submitted with the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 N.19 (9th Cir. 1989), Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279 (9th Cir. 1986).

For all of these reasons, it is only under extraordinary circumstances that dismissal is proper under Rule 12(b)(6). United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied "when the court determines that other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

III. Analysis

A. Breach of the Duty of Fair Representation

Defendants argue that plaintiffs' SAC fails to state a claim for breach of the duty of fair representation ("DFR").[2]

The DFR, derived from 29 U.S.C. § 159(a), imposes on unions the duty to fairly represent those within the bargaining unit, both as individuals " as well as collectively," in the

---

[2] Plaintiffs assert that defendants' motion is nothing more than a motion for reconsideration of the April 1998 Order denying dismissal, and thus that the Court should not consider defendants' arguments. However, the Court notes that the April 1998 motion to dismiss was brought on the basis of Garmon preemption, rather than on the merits of the claims. Having decided in the April 1998 Order only that the claims are not preempted under San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), the Court will address the arguments raised in the instant motion.

administration of a collective bargaining agreement. Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1235 (8th Cir. 1980).

> A union must conform its behavior to each of ... three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Nest, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

Griffin v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, 469 F.2d 181, 183 (4th Cir. 1972). See also Conkle v. Jeong, 73 F.3d 909, 915 (9th Cir. 1995).

The scope of the DFR is not precisely defined, and must be determined on a case-by-case basis. See Hurd v. Ralphs Grocery Co., 824 F.2d 806, 810 (9th Cir. 1987); Smith, 619 F.2d at 1235; Griffin, 469 F.2d at 182. In determining whether a particular set of facts constitutes a breach of the DFR, the court must consider whether the complaint of action is inimical to the goals and purposes of the federal labor laws. See Smith, 619 F.2d at 1235; St. Clair v. Local Union No. 515, 422 F.2d 128, 130 (6th Cir. 1969).

Defendants' argument that plaintiffs' SAC fails to state a claim for breach of the DFR is two-fold. First, defendants argue that because plaintiffs allege that forty-two of the fifty-

two employees at plaintiffs' place of employment, Sorrento, had presented Sorrento's management with a petition ("the petition") stating that they no longer wished to be represented by UNITE-SW and that Sorrento then "withdrew recognition of UNITE-SW as exclusive bargaining representative of its employees," SAC at ¶¶ 10-11, UNITE-SW was in fact no longer plaintiffs' exclusive collective bargaining agent, and thus, owed plaintiffs no duty.[3]

"As a general rule the duty of fair representation arises when a union is certified as an exclusive bargaining representative. However, an exception to the certification requirement obtains when a union holds 'itself out as exclusive representative with the intent and effect of creating reliance thereon.' In such cases, the union is estopped from denying its status as the certified exclusive representative." Quarles v. Remington Arms, Co., 848 F. Supp. 328, 331 (D. Conn. 1994) (quoting Chavez v. United Food & Comm'l Workers Int'l Union, 779 F.2d 1353, 1357 (8th Cir. 1986).

---

[3] Plaintiffs' DFR claim alleges that Sorrento relied heavily on word provided by M. Shapiro, a blazer manufacturer, whose employees were also represented by UNITE-SW. The SAC alleges that, after Sorrento employees presented the petition to management and Sorrento attempted to withdraw recognition of UNITE-SW as the exclusive bargaining agent, UNITE-SE attempted to retaliate against the Sorrento employees by convincing M. Shapiro to stop sending work to Sorrento. Although UNITE-SW argues that its actions were justified by its collective bargaining agreement with M. Shapiro which allowed the union to insist that M. Shapiro work only with unionized shops, the SAC alleges that UNITE-SW acted with malice and in bad faith, thus violating the DFR.

It is not clear from the SAC or from the arguments by either side whether the employees' petition or Sorrento's withdrawal of recognition of UNITE-SW effectively extinguished defendants' duty as a matter of law. Indeed, plaintiffs also allege in the SAC that UNITE-SW responded to the withdrawal of recognition by filing with the National Labor Relation Board ("NLRB") an unfair labor practice charge against Sorrento , for unlawful withdrawal of recognition, this Court and that the charge was pending as of the filing date of the SAC. See SAC at ¶ 13. Until the NLRB has determined the issues regarding the withdrawal of recognition was effective as a matter of law.

Furthermore, plaintiffs allege that UNITE continued to hold itself out as exclusive bargaining representative for Sorrento employees. See SAC at ¶ 12. Thus, even if the withdrawal of recognition was effective, plaintiffs have alleged a situation under which the DFR applied to UNITE.

The second ground upon which defendants base their motion is that, even assuming that UNITE-SW was the exclusive bargaining agent for the employees at plaintiffs' employer, the complained of actions were not within the scope of the defendants' DFR. In support of this position, defendants assert that there is nothing within the collective bargaining agreement, and no legal authority, which imposes upon a union a duty with regard to controlling the flow of work to the employer. This argument, although not without logic, focuses solely on the effect of defendants' alleged actions, and does not address plaintiffs' allegation that defendants were acting in retaliation for plaintiffs' attempt to withdraw from the union. Neither party has pointed to any authority which addresses a factual situation similar to the one

at bar. Until the record has been more fully developed, it would be premature to foreclose the possibility that plaintiffs have alleged a cognizable claim for breach of the DFR. Given that the scope of the DFR is not well-defined and that the DFR mandates that unions act without hostility and bad faith as to the employees within the bargaining units it represents, it is possible that the facts support a claim that the defendants did have a DFR as to the plaintiffs and that defendants, did, in fact, breach that duty. Accordingly, defendants' motion to dismiss as to plaintiffs' first claim is denied.

B. Negligent Infliction of Emotional Distress

The Court finds that plaintiffs' claim for negligent infliction of emotional distress fails to allege a breach of a cognizable duty. The SAC alleges that the duty which defendants allegedly breached was "a duty to act in the best interests of the employees" which arose "by virtue of [defendants'] status as exclusive bargaining representative for the bargaining unit of employees." SAC at ¶ 53. However, as plaintiffs concede in their opposition to the instant motion, this allegation restates the duty of fair representation and, thus, would be preempted under federal law. Plaintiffs attempt to salvage the claim for negligent infliction of emotional distress by agreeing to strike as surplusage the paragraphs that contain the "duty to act in the best interests of the employees" language. However, doing so leaves only paragraph 56,[4] which fails to adequately identify the duty

[4] Paragraph 56 states: "As a direct and proximate result of UNITE-SW's breach of its duty of due care to plaintiffs, plaintiffs have suffered humiliation, mental anguish, loss of economic security and

which defendants are alleged to have breached. For this reason, the Court hereby grants defendants' motion to dismiss plaintiffs' claim for negligent infliction of emotional distress, with leave to amend.

C. Intentional Interference with Contractual Relations and Intentional Interference with Prospective Economic Advantage

Under 29 U.S.C. § 187(a), "[i]t shall be unlawful...in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title." Section 158(b)(4) states, in relevant part, that it is an unfair labor practice for a labor organization or its agents:

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is-
>
> ...
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person....

---

livelihood, fear, intimidation, and mental and emotional distress and suffering, in an amount to be proven at trial."

State law claims based on the activities proscribed under sections 187(a) and 158(b)(4) are preempted by the federal scheme, unless the complained of conduct is "marked by violence and imminent threats to the public order." Local 20, Teamsters v. Morton, 377 U.S. 252, 257-60 (1964). "State jurisdiction has prevailed in there situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." Garmon, 359 U.S. at 247-48. See also United Mine Workers of America v. Gibbs, 383 U.S. 715, 729 (1966); Morton, 377 U.S. at 257.

In the instant case, plaintiffs' claims fall squarely into the activities proscribed under sections 187(a) and 158(b)(4).[5] Essentially, plaintiffs are alleging that defendants approached an employer, M. Shapiro, that has supplied a great deal of work to plaintiff's employer, Sorrento, over the years and convinced M. Shapiro to stop sending work to Sorrento. Thus, unless plaintiffs have adequately alleged violence and imminent threats to public order, the state law claims are preempted.

---

[5] Defendants assert that plaintiffs allegations actually fall within a category of activity expressly protected under 29 U.S.C. § 158(e), which exempts unions associated with the apparel and clothing industry from liability for the activities otherwise proscribed under section 158(b)(4). However, because the focus of the motion is whether or not plaintiffs' state law business tort claims are preempted for failure to allege violence, the Court does not reach the issue of whether a claim brought under section 187 would be futile.

In Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941), the Court discussed the sorts of activities that may take a claim outside the bounds of federal labor law preemption:

> [A]cts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that he momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful....We cannot say that such a finding so contradicted experience as to warrant our rejections, nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct.

Id. at 294-295.

In United Mine Workers of America v. Gibbs, the Court, discussing the above- quoted language from Milk Wagon in the context of preemption under 29 U.S.C. § 187, found that "[s]uch special facts, if they appeared in an action for damages after picketing marred by violence had occurred, might support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered." Id. at 731-32.

The Court finds that, although plaintiffs have alleged a background of violence between defendants and M. Shapiro,

plaintiffs have not alleged that defendants used violence or an imminent threat to public order in causing M. Shapiro to stop sending work to Sorrento. Indeed, plaintiffs use language such as "threaten" and "coerce," which is exactly the language of section 158(b)(4)'s definition of an unfair labor practice. Thus, because plaintiffs' state law claims allege activity which is addressed directly under sections 187 and 158, and plaintiffs have failed to allege any facts to take the claims outside the federal scheme, plaintiffs' state law claims for intentional interference with contractual relations and intentional interference with prospective economic advantage are preempted. Accordingly, the Court hereby grants defendants' motion to dismiss as to plaintiffs' fourth and fifth claims, with leave to amend.

IV. Conclusion

The Court hereby denies defendants' motion to dismiss as to plaintiffs' first claim, and grants defendants' motion to dismiss as to plaintiffs' third, fourth and fifth claims, with leave to amend.

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

LOCAL RULE 4.2.2 NOTIFICATION

Pursuant to Rule 4.2.2 of the Local Rules of the United States District Court for the Central District of California, plaintiffs hereby notify this Court that this action involves a material part of an action pending before Region 31 of the National Labor Relations Board in Los Angeles, California.

NLRB Case No. 31-CA-22699 consists of a Complaint issued November 6, 1997 by Region 31 of the National Labor Relations Board ("NLRB"). The parties are Sorrento Coats, Inc. ("Sorrento"), the employer of the plaintiffs herein, and Union of Needletrades, Industrial & Textile Employees, Southwest District Council ("the Union"), a defendant herein. A true and correct copy of the Complaint and Notice of Hearing is attached hereto as Exhibit "A".

Plaintiffs, upon learning indirectly of the NLRB's intent to issue a Complaint, on October 30, 1997 filed a Motion for Leave to Intervene in NLRB Case No. 31-CA-22699 in order to protect their rights under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 ("N.L.R.A.") and the United States Constitution. A true and correct copy of the Motion for Leave to Intervene is attached hereto as Exhibit "B".

Byron B. Kohn, Acting Regional Director for region 31 of the NLRB, on November 4, 1997 issued an Order Denying

Motion for Leave to Intervene. A true and correct copy of the Order Denying Motion to Intervene is attached hereto as Exhibit "C".

Plaintiffs by overnight delivery on November 13, 1997 filed with the full National Labor Relations Board a Request for Permission to Appeal From Order of (Acting) Regional Director Denying Motion for Leave to Intervene and Appeal. A true and correct copy of the Request for Permission to Appeal From Order of (Acting) Regional Director Denying Motion for Leave to Intervene and Appeal is attached hereto as Exhibit "D".

Plaintiffs believe that the denial of their Motion for Leave to Intervene by the Acting Regional Director of Region 31, if not overruled by the NLRB, will prejudice their rights under Section 7 of the N.L.R.A. Although plaintiffs, a majority of the Sorrento workforce, have clearly demonstrated their unwillingness to continue to be represented by the Union, as shown by their presentation of a decertification petition to Sorrento in April 1997 and their filing of said petition with the NLRB on August 22, 1997, they are concerned that their exclusion from the NLRB proceedings may result either in a bargaining order requiring Sorrento to recognize the Union as their exclusive bargaining representative, a result that would be directly contrary to the stated desires of the employees as a majority of the Sorrento workforce, thus, in conflict with the principle of freedom of choice embodied in the N.L.R.A. to protect employees' constitutional rights.

The General Counsel of the NLRB in its Complaint in Case No. 31-CA-22699 alleges, inter alia, that the Union has been plaintiffs' exclusive bargaining representative (¶ 7(c) and

(d)), that Sorrento refused and failed to recognize and bargain with the Union since on or about February 24, 1997 (¶ 8), that Sorrento withdrew recognition of the Union as the employees' exclusive bargaining representative (¶¶ 10, 12), and that Sorrento in or around May 1997 "initiated a decertification petition and/or solicited employees to sign a decertification petition" (¶ 17). The General Counsel further alleges that these alleged actions by Sorrento violated Sections 8(a)(1) and (5) of the N.L.R.A., 29 U.S.C. §§ 158(a)(1) and (5).

NLRB Case No. 31-CA-22699 is related to the instant case in material part because plaintiffs in their Complaint allege: (1) that they, not the employer, initiated, possessed and filed their decertification petition and (2) that the Union's actions taken (a) in retaliation for their presentation of the petition to Sorrento, and Sorrento's withdrawal of recognition of the Union as their exclusive bargaining representative in response thereto, and (b) in retaliation for their filing of the petition with the NLRB, constitute a (continuing) breach of the Union's Duty of Fair Representation ("DFR"), a factor which, in the event of a finding of employer violation, bust be considered by the NLRB acting in equity to fashion a remedy. In contrast, in his order denying plaintiffs' motion to intervene, the Acting Regional Director stated he deemed the DFR allegations not relevant to the unfair practice proceedings.

The NLRB's actions to date, including: (a) refusal to permit plaintiffs to intervene in Case No. 31-Ca-22699, (b) automatic determination that plaintiffs' decertification petition should be "blocked" by the Union's unfair labor practice charges, despite the fact that they were filed after plaintiffs

presented Sorrento with the decertification petition, (c) permission for the Union to amend the charges twice, even once after plaintiffs filed the decertification petition with the NLRB, and (d) conclusion that the DFR allegations in the Complaint herein "are not relevant to a determination of the Union's status as the bargaining representative", taken together, indicate to plaintiffs that there rights under the N.L.R.A. are currently in danger of being disregarded by the NLRB and that only this Court can provide relief from the Union's breach of the Duty of Fair Representation and for plaintiffs' State causes of action, as set forth in the Complaint herein.

The attorneys involved in NLRB Case No. 31-CA-22699 are Falk & Sharp, 660 S. Figueroa Street, #1600, Los Angeles, California 90017, (213) 622-6868 by Keith Sharp, for Respondent Sorrento Coats; Reich, Adell, Crost & Svitan, 501 Shatto Place, Suite 100, Los Angeles, California 90020, (213) 386-3860 by Laurence Zakson and Carlos Perez for charging party (the Union), and Parker, Milliken, Clark, O'Hara & Samuelian (address and telephone provided, supra), by Linda S. Klibanow and John P. Schaedel, for the attempted Intervenors (plaintiffs herein).

Dated: November 13, 1997

Respectfully Submitted,

Parker, Milliken, Clark, O'Hara
& Samuelian
A Professional Corporation
Linda S. Klibanow
John P.Schaedel

Local Rule 4.2.2 Notification

/s/_____
Linda S. Klibanow
Attorneys for Plaintiffs

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 333 South Hope Street, 17th Floor, Los Angeles, California 90071.

On November 13, 1997 I served the foregoing document described as NOTICE OF PENDENCY OF OTHER ACTIONS OR PROCEEDINGS [LOCAL RULE 4.4.2](OPPOSITION TO DEFENDANT UNION OF NEEDLETRADES, INDUSTRIAL & TEXTILE EMPLOYEES, SOUTHWEST DISTRICT COUNCIL'S EX PARTE APPLICATION FOR EXTENSION OF TIME, FILED CONCURRENTLY HEREWITH) on all interested parties by placing a true copy in envelopes addressed as follows:

Laurence S. Zakson
Carlos R. Perez
Reich, Adell, Crost & Cvitan
501 Shatto Place
Suite 100
Los Angeles, CA 90020-1792

Local Rule 4.2.2 Notification

Ellen Greenstone, Esq.
Rothner, Segall, Bahan & Greenstone
200 East Del Mar Blvd., Suite 200
Pasadena, CA 91105-2444

The envelopes were then sealed and deposited for collection and mailing in accordance with my employer's normal procedures. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service, with all postage prepaid, at Los Angeles, California, on the same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I made such service at the direction of a member of the bar of this court. Executed November 13, 1997 at Los Angeles, California.

/s/_____
Treasa Ward

APPENDIX G

SEE FOLD OUT EXHIBIT

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

NO. 31-RD-1373

[Filed August 22, 1997]

FORM NLRB-502 (5-85)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
31-RD-1373	AUG 22 1997

INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. PURPOSE OF THIS PETITION *(If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)* (Check One)

- ☐ **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☐ **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☒ **RD-DECERTIFICATION** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- ☐ **UD-WITHDRAWAL OF UNION SHOP AUTHORITY** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- ☐ **UC-UNIT CLARIFICATION** - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: *(Check one)* ☐ In unit not previously certified. ☐ In unit previously certified in Case No. _____.
- ☐ **AC-AMENDMENT OF CERTIFICATION** - Petitioner seeks amendment of certification issued in Case No. _____ *Attach statement describing the specific amendment sought.*

2. Name of Employer	Employer Representative to contact	Telephone Number
Sorrento Coats, Inc.	Simeon Prophet	909-381-1761

3. Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*
125 East Rialto Avenue, San Bernardino, CA 92408

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*	4b. Identify principal product or service
Apparel Factory (sew, press and ship)	Ladies Clothing

5. Unit Involved *(In UC petition, describe present bargaining unit and attach description of proposed clarification.)*

Included
production and maintenance employees

Excluded
owners, partners, managers, engineers, supervisors who have right to hire and fire, watchmen, guards

6a. Number of Employees in Unit:
Present: 50
Proposed *(By UC/AC)*:

6b. Is this petition supported by 30% or more of the employees in the unit? * X Yes ___ No
*Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. ☐ Request for recognition as Bargaining Representative was made on *(Date)* _____ and Employer declined recognition on or about *(Date)* _____ *(If no reply received, so state).*

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent *(If none, so state)*	Affiliation
UNITE, Southwest District Council	
Address and Telephone Number	**Date of Recognition or Certification**
675 South Parkview St., 2nd Floor, Los Angeles, CA 90075	Approximately 1990

9. Expiration Date of Current Contract, If any *(Month, Day, Year)*	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop *(Month, Day, and Year)*
Expired February 28, 1997	

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes ___ No X	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of *(Insert Name)* _____, a labor organization, at *(Insert Address)* _____ Since *(Month, Day, Year)* _____

12. Organizations or individuals other than Petitioner *(and other than those named in items 8 and 11c)*, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. *(If none, so state)*

Name	Affiliation	Address	Date of Claim *(Required only if Petition is filed by Employer)*

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

TAUNI SIMO and MARIA RAMIREZ
(Name of Petitioner's Official Representative, if any)

By: _____ Attorney
(Signature of Representative or person making request) *(Title, if any)*

LINDA S. KLIBANOW
Address 333 S. Hope Street, 27th Floor, Los Angeles, CA 90071 213-687-6664
(Street and number, city, State, and ZIP Code) *(Telephone Number)*

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

BEST AVAILABLE COPY

Nosotros la gente de Sorrento Coats no queremo ser representados mas por la Union

Angelina Pires
Maria Osorio
Elba Lomz
Noemi Mejia
Maria Padilla
Evangelina Arteaga
Lourdes Gonzalez
Maria Clara

Mariana Godina
Petra Villegas
Petra de Leon
Ana B Gonzales
Velma Garcia
M Rosario Alvarez
Gabriela Uribe
Merela Arana
Lidia L. Perez
Mercedes Figueroa
Emerita I Hernandez
Guadalupe Cárdenas
Lucia mendez
Carmen Flores
Lupe T Enriquez
Silvia Leon R.
Victoria Velasquez

maria aguirre
Alicia Gonzalez.
Carly Fermandez
Laura Gonzalez
Petra G Bracamontes
Josefina Sanabia

We the People of Sorento coats
do not want to be Represented
by the union any more

Willyako Kawai

Heriberto Dato

Jesus A Costi

Rogelio Romero

Chong Sook Kim

Ana Espino

Margarita Mayorquin

Karen L Mullennex

Walter I Pasco

117a

APPENDIX H

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 31

No. 31-CA-22699

[Dated November 4, 1997]

In the matter of:	)
	)
SORRENTO COATS, INC.	)
	)

ORDER DENYING MOTION FOR LEAVE TO INTERVENE

On or about October 30, 1997, through their attorney Linda S. Klibanow, certain purposed employees of Sorrento Coats, Inc., moved to intervene in the above-captioned case pursuant to National Labor Relations Board Rules and Regulations Section 102.29.

IT IS HEREBY ORDERED that said motion be, and the same hereby is, denied on the following grounds:

To the extent that the motion seeks to raise questions concerning the Union's representational status under Section

9(a) of the Act the undersigned is satisfied that none of the employees referenced in the motion, either individually or collectively, is a necessary party to the proceedings in Case 31-CA-22699. *Semi-Steel Casting Co.,* 160 F.2d 388, 393 (8th Cir. 1947); *United Dairy Farmers Cooperative Assn.,* 242 NLRB 1026, 1045 (1979). Furthermore, the undersigned notes that in support of said motion counsel cites the Board's decision in *Nu-Aimco,* 306 NLRB 978 (1992). That case was specifically overruled by the Board in *Douglas-Randall, Inc.,* 320 NLRB 431 (1995). Counsel is directed to Rule 5-200 (D) of the California Rules of Professional Conduct.

Finally, to the extent that the motion references a lawsuit filed in United States District Court over an alleged violation of the duty of fair representation, I am of the view that such matters are not relevant to a determination of the Union's status as the bargaining representative in the instant case, given the nature of the unfair labor practices alleged in Case 31-CA-22699.

Dated this 4th day of November 1997, at Los Angeles, California.

/s/_____

Byron B. Kohn, Acting Regional Director
National Labor Relations Board
Region 31
11000 Wilshire Blvd., Suite 12100
Los Angeles, CA 90024-3682

APPENDIX I

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 31
11000 Wilshire Boulevard - Room 12100
Los Angeles, CA 90024-3682
Telephone (310) 235-7351

December 4, 1997

Linda Klibanow, Esquire
Parker, Milliken, Clark,
O'Hare & Samuelian
333 South Hope St., 27th Floor
Los Angeles, CA 90017-1488

Re: Sorrento Coats, Inc.
Case 31-RD-1373

Dear Ms. Klibanow:

The above captioned case, petitioning for an investigation and certification of representative under Section 9(c) of the National Labor Relations Act, as amended, has been carefully investigated and considered. In this matter you represent the two individual petitioners, Tavni Simo and Maria Ramirez.

As a result of the investigation, it does not appear that further proceedings are warranted with respect to the instant petition. In this regard it is noted that said petition was filed by Tavni Simo and Maria Ramirez on August 22, 1997, and supported

by undated employee signature petitions whereon the employee signers indicate that they no longer wish to be represented by the incumbent Union. In a signed affidavit given to a Board agent on August 22, 1997, Maria Ramirez, one of the two individual petitioners, states that the showing of interest signatures were obtained sometime in May, 1997. The affiant appears to be unable to establish the date or dates of the signing of the showing of interest petitions with any greater specificity. On November 6, 1997, the Acting Regional Director issued a Complaint and Notice of Hearing in Case No. 31-CA-22699, a copy of which is attached hereto. Therein, it is alleged, inter alia, that the Union of Needletrades, Industrial & Textile Employees, AFL-CIO, hereinafter referred to as the Union, has, since at least July 1995, been the Section 9(a) exclusive collective bargaining representative of the unit of employees involved in the instant petition; the Employer has, since on or about February 24, 1997 engaged in several unfair labor practices including failing to and refusing to meet at reasonable times and places with the Union, demonstrating it had no intention to reach an agreement with the Union, failing and refusing to execute an agreement previously reached with the Union; the Employer has, since on or about January 22, 1997, insisted as a condition for reaching an agreement with the Union, that the latter agree to remove one of its shop stewards; the Employer has on or about May 12, 1997, unlawfully withdrawn recognition from the Union; since in or around early May, 1997, the Employer unlawfully told unit employees they would get better benefits if they got rid of the Union; since in or around early to mid May 1997, the Employer has advised employees it did not want a union, would never sign another contract, and promised employees improved benefits if there was no union; since in or around early May, 1997, the

Employer has initiated a decertification petition and/or solicited employees to sign a decertification petition. A hearing before an Administrative Law Judge with respect to the above described unfair labor practice allegations is presently scheduled for March 9, 1998.

On the basis of many of the unfair labor practice allegations contained in the attached Complaint and Notice of Hearing and summarized supra, I conclude that the instant petition fails to raise a question concerning representation at this time. Specifically, I note those allegations of the Complaint and Notice of Hearing which allege a violation of Section 8(a)(1) and (5) of the Act, and the allegation of the document (Paragraph 16) which alleges in effect, direct Employer involvement in obtaining signatures of the "showing of interest" signature petitions submitted in support of the instant petition. In my view, these specific complaint allegations taint the showing of interest submitted in support of the petition and warrant dismissal of the said petition. Accordingly, the instant petition is dismissed. The Petitioner is advised that the petition which I have administratively dismissed is subject to reinstatement, if appropriate, on the Petitioner's application for same after disposition of the related unfair labor practice proceeding in connection with Case No. 31-CA-22699.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the National Labor Relations Board, Washington, D.C. 20570. A copy of such must be served upon each of the other parties to the proceeding, including the undersigned. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal (8 copies) should be filed with the Board in

Washington, D. C. 20570 by close of business December 18, 1997, except that the Board may, upon good cause shown, grant special permission for a longer period within which to file. The request for extension of time should be submitted to the Board in Washington, and a copy of any such request for extension of time should be submitted to me and to the other parties to this proceeding.

The appeal and the request for extension of time must include a statement that a copy has been served on me and on each of the other parties to this proceeding in the same or faster manner as that utilized in filing the request with the Board.

Very truly yours,

/s/_____
James J. McDermott
Regional Director

cc: Tavni Simo, 7192 Catalpa Avenue, Highland, CA 92346

Maria Ramirez, 346 "0" Street, Colton, CA 92324

Laurence S. Zakson, Esquire, Reich, Adell, Crost & Cvitan, 501 Shatto Place, Suite 100, Los Angeles, CA 90020-1792

Keith Sharp, Esquire, Falk & Sharp, 660 S. Figueroa Street, Suite 1600, Los Angeles, CA 90017

UNITE, Southwest District Council, 675 South Parkview Street, 2nd Floor, Los Angeles, CA 90075

Sorrento Coats, Inc., Attn. Simon Prophet, 125 East Rialto Avenue, San Bernardino, CA 92408

APPENDIX J

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570-0001

March 3, 1998

SORRENTO COATS, INC.
CASE 31-RD-1373

PETITIONER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S ADMINISTRATIVE DISMISSAL OF THE PETITION IS DENIED, AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVERSAL OF THE REGIONAL DIRECTOR'S ACTION. ACCORDINGLY, DISMISSAL OF THE PETITION IS AFFIRMED.

BY DIRECTION OF THE BOARD, MEMBER BRAME, DISSENTING.

JOHN J. TONER
EXECUTIVE SECRETARY

cc: Parties

APPENDIX K

SEE FOLD OUT EXHIBIT

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

NO. 31-RD-1393

[Filed August 26, 1998]

ORIGINAL

FORM NLRB-502 (5-85)

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 31-RD-1393	Date Filed 8/26/98

INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. PURPOSE OF THIS PETITION *(If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)* (Check One)

- ☐ **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☐ **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☒ **RD-DECERTIFICATION** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- ☐ **UD-WITHDRAWAL OF UNION SHOP AUTHORITY** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- ☐ **UC-UNIT CLARIFICATION** - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: *(Check one)* ☐ In unit not previously certified. ☐ In unit previously certified in Case No. _____.
- ☐ **AC-AMENDMENT OF CERTIFICATION** - Petitioner seeks amendment of certification issued in Case No. _____. *Attach statement describing the specific amendment sought.*

2. Name of Employer	Employer Representative to contact	Telephone Number
Sorrento Coats, Inc.	Simeon Prophet	909-381-1761

3. Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*
125 E. Rialto Ave., San Bernardino, CA 92408

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*	4b. Identify principal product or service
Apparel Factory (sew, press, ship)	Ladies Clothing

5. Unit involved *(In UC petition, describe present bargaining unit and attach description of proposed clarification.)*

Included: production and maintenance employees

Excluded: owners, partners, managers, engineers, supervisors with right to hire/fire, watchmen, guards

6a. Number of Employees in Unit:
Present: approx. 70
Proposed *(By UC/AC)*:

6b. Is this petition supported by 30% or more of the employees in the unit? * X Yes ___ No
*Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. ☐ Request for recognition as Bargaining Representative was made on *(Date)* _____ and Employer declined recognition on or about *(Date)* _____ *(If no reply received, so state).*

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent *(If none, so state)*	Affiliation
UNITE, Southwest District Council	
Address and Telephone Number	**Date of Recognition or Certification**
675 South Parkview St., 2nd Floor, Los Angeles, CA 90075	approx. 1990

9. Expiration Date of Current Contract, If any *(Month, Day, Year)*	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop *(Month, Day, and Year)*
Expired February 28, 1998 An Extension by stipulation	

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes ___ No ___	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of *(Insert Name)* _____, a labor organization, of *(Insert Address)* _____ Since *(Month, Day, Year)* _____

12. Organizations or individuals other than Petitioner *(and other than those named in items 8 and 11c)*, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. *(If none, so state)*

Name	Affiliation	Address	Date of Claim *(Required only if Petition is filed by Employer)*

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Petitioners T. Simo, L. Gonzalez, D. Olivas, S. Madrigal, M. Osorio, et al. as individuals
(See attached Petition and *(Name of Petitioner and Affiliation, if any)* showing of interest

By _____ 8/25/98
(Signature of Representative or person filing petition) Linda S. Klibanow *(Title, if any)* Attorney

Address 333 S. Hope St., 27th Flr., Los Angeles, CA 90071-1488 213-683-6664
(Street and number, city, State, and ZIP Code) *(Telephone Number)*

WILLFUL FALSE STATEMENTS ON THIS FORM CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

TOTAL P.01

BEST AVAILABLE COPY

APPENDIX L

San Bernardino, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

SORRENTO COATS, INC.

Cases 31-CA-22699
31-CA-22991

and

SOUTHWEST DISTRICT COUNCIL,
UNION OF NEEDLETRADES,
INDUSTRIAL & TEXTILE EMPLOYEES,
AFL-CIO, CLC

SORRENTO COATS, INC.

Case 31-CA-23064

and

ILGWU-EMPLOYERS VACATION,
HEALTH AND WELFARE FUND

DECISION AND ORDER

Statement of the Cases

On March 15, 1998, Sorrento Coats, Inc., herein called the Respondent; ILGWU-Employers Vacation, Health and Welfare Fund, herein called the Fund and the Acting General

Counsel of the National Labor Relations Board, entered into a Settlement Stipulation, subject to the Board's approval, providing for the entry of a consent order by the Board and a consent judgment by any appropriate United States Court of Appeals.[1] The parties waived all further and other proceedings before the Board to which they may be entitled under the National Labor Relations Act, as amended, and the Board's Rules and Regulations, and the Respondent waived its right to contest the entry of a consent judgment or to receive further notice of the application therefor.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

As noted above, the Union refused to execute and objected to the Settlement Stipulation on the basis that it included non-admission language. In addition, the employee-petitioners in Case 31-RD-1373 sought status as intervenors in this proceeding after the Regional Director dismissed their decertification petition because of the unfair labor practices alleged in the instant cases. The request for intervention was denied by the Regional Director and the employees filed a request for special permission to appeal that decision with the Board as well as a request for review of the dismissal of the petition. The request for special permission to appeal was granted and the Board on February 26, 1998, remanded the intervention issue for consideration by the administrative law

---

[1] Southwest District Council, Union of Needletrades, Industrial & Textile Employees, AFL-CIO, CLC, the Union, refused to execute and objected to the Settlement Stipulation on the basis that it included non-admission language.

judge. The request for review of the dismissal of the petition was denied. Thereafter, the administrative law judge denied the motion to intervene and the employees again requested special permission to appeal. On August 10, 1998, counsel for the employee-petitioners sought to withdraw this request.

Having duly considered the matter, we find that the Union's objections to the settlement do not warrant disapproval of the settlement and that the settlement will effectuate the purposes and policies of the Act. See *UMWA (James Bros. Coal Co.)*, 191 NLRB 209 (1971). In addition, we grant the employee petitioners' request to withdraw their request for special permission to appeal the judge's order denying their request to intervene.

Accordingly, the Settlement Stipulation is approved and made a part of the record, and the proceeding is transferred to and continued before the Board in Washington, D.C., for the entry of a Decision and Order pursuant to the provisions of the Settlement Stipulation.

Upon the basis of the Settlement Stipulation and the entire record, the Board makes the following:

Findings of Fact

1. The Respondent's business

At all material tines the Respondent, a corporation with an office and place of business in San Bernardino, California, herein called the Respondents, facility, has been engaged in the business of sewing womens coats and blazers.

The Respondent in the last twelve months in conducting its business operations derived gross revenues from sales or performance of services equal to or in excess of $50,000 to firms which themselves directly made sales to customers outside the State of California in excess of $50,000 and/or to firms which themselves made purchases directly from outside the Sate of California in excess of $50,000, all within the same period of time.

The Respondent within the last twelve months conducting its business operations, derived gross revenue in excess of $500,000.

The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2 (2) , (6) and (7) of the Act.

2. The labor organization involved

Southwest District Council, Union of Needletrades, Industrial & Textile Employees, AFL-CI0, CLC is a labor organization within the meaning of Section 2(5) of the Act. At all times since at least July 1995, the Union has been the exclusive collective-bargaining representative of all the employees in the Unit found appropriate within the meaning of Section 9 (a) of the Act.

3. The appropriate unit

All production and maintenance employees, present and future, including but not necessarily limited to workers employed as helpers, operators, pressers, sample makers, finishers, drapers, embroiderers, pleaters, shipping and

receiving department employees, mechanics, maintenance employees, and general non-supervisory floor help; excluding owners and partners, managers and engineers, and other supervisors who have the actual right to hire and fire, but do not handle production work as part of their regular work or any other work belonging -- the bargaining unit, watchmen and guards constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

ORDER

Upon the basis of the above findings of fact, the Settlement Stipulation, and the entire record in the proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that:

The Respondent, Sorrento Coats, Inc., its officers, agents, successors, and assigns shall:

1. Shall not:

(a) Unlawfully withdraw recognition from the Union at a time when the Union has an unrebutted presumption of majority status; refuse to meet with the Union at reasonable times and places for the purpose of bargaining; refuse to execute the agreed-upon February 24, 1997 one-year extension of the collective-bargaining agreement with the Union, herein called the Agreement; meet with the Union with a fixed intention not to reach agreement; condition the signing of a collective-bargaining agreement on removal of

a Union steward or on any other permissive subject of bargaining; engage in direct dealing with our Unit employees; and fail or refuse to make contributions on behalf of Unit employees to the ILGWU-Employers Vacation, Health and Welfare Fund, herein called the Fund, as required by the Agreement.

(b) Tell employees that it will not sign a contract with the Union unless the Union removes one of its stewards from this position, or over any other permissive subject of bargaining; promise benefits to employees if they cease supporting the Union; threaten employees with closure of our facility if they continue to support the Union or if the Union continues to represent them; initiate or assist in the circulation of a petition to decertify the Union; threaten employees with job loss by telling them they are throwing away their years with the company and that they should ask the Union for work; interrogate employees as to why they did not sign a petition to decertify the Union, and whether anyone held a gun to their head to sign the petition.

(c) In any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act, as amended, herein called the Act.

2. Take the following affirmative action which the National Labor Relations Board finds will effectuate the policies of the National Labor Relations Act, as amended:

(a) Recognize the Union as the collective-bargaining representative of the Unit employees; acknowledge the existence of, execute, give retroactive effect to, and abide by

the terms of the Agreement, and thereafter, upon the Unions request, meet at reasonable times and places and bargain in good faith either to a bona fide impasse or to agreement on the terms of a successor labor contract, and maintain the wages, hours and other terms and conditions of employment in the Agreement until such time as the parties have bargained in good faith to an agreement or to impasse over any proposed changes in such working conditions; and make all contractually-required contributions on behalf of Unit employees due and owing to the Fund pursuant to the Agreement.

(b) Post in conspicuous places at the Respondents business offices and in all other places where notices to employees are customarily posted, copies of the attached Notice of Employees. Copies of said Notice, to be furnished by the Regional Director for Region 31, shall, after being duly signed by the Respondents representatives, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places as described above. Reasonable steps shall be taken by the Respondent to ensure that said Notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., September 16, 1998.

Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS HURTGEN AND BRAME, concurring:

We agree to grant the employee-petitioners' request to withdraw their appeal regarding the denial of their intervention. We also agree that the settlement of the instant cases should be approved notwithstanding the inclusion of a non-admission clause. However, we wish to emphasize that the issue of whether the decertification petition filed on August 22, 1997, should remain dismissed is not before the Board. The Regional Director dismissed the petition on December 4, 1997, in light of the 8 (a)(1) and (5) complaint. However, that dismissal was subject to reinstatement, if appropriate, upon conclusion of the 8 (a)(1) and (5) case. Clearly, if the unfair labor practice allegations had been established, it would not have been appropriate to reinstate the decertification petition. Equally clearly, if the unfair labor practice allegations had been dismissed, it would have been appropriate to revive the decertification petition. In our view, where, as here, the unfair labor practice allegations have been settled, it would be appropriate to revive the decertification petition upon request. That is, since no unfair labor practices have been found, the decertification petition is not shown to be tainted. Further, the petitioners have not agreed to withdraw their petition. In these circumstances, and in agreement with the dissent in *Douglas Randall*, 320 NLRB

431 (1995), we would permit the revival of the decertification petition upon the request of petitioners. To do otherwise is to trample upon the Section 7 rights of the petitioners to seek decertification of the Union. We recognize, however, that in the absence of a majority of the Board to reverse *Douglas Randall*, that decision remains the prevailing law of the Board.

Dated, Washington, D.C., September 16, 1998.

Peter J. Hurtgen, Member

J. Robert Brame III, Member

NATIONAL LABOR
RELATIONS BOARD

APPENDIX M

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 31
11150 West Olympic Boulevard, Suite 700
Los Angeles, CA 90064-3682
Telephone: (310) 235-7351
Fax: (310) 235-7420

December 11, 1998

Linda S. Klibanow, Esquire
Parker, Milliken, Clark, O'Hara & Samuelian
333 So. Hope St., 27th Floor
Los Angeles, CA 90071-1488

Re: Sorrento Coats, Inc.
Case 31-RD-1393

Dear Ms. Klibanow:

The above captioned case, petitioning for an investigation and certification of representative under Section 9 (c) of the National Labor Relations Act, as amended, has been carefully investigated and considered. In this matter you represent the several individual petitioners including T. Simo, L. Gonzalez, D. Olivas, S Madrigal, and M. Osorio.

As a result of the investigation, it does not appear that further proceedings are warranted with respect to the instant petition as, in my view, the showing of interest submitted in support

of it is tainted by several significant alleged unfair labor practices of the Employer which were unremedied at the time the showing of interest was secured, and appear to remain unremedied at the present time.

Before discussing the specifics of the instant matter, a brief review of a prior related case is in order.

On August 22, 1997, you filed a petition in connection with Case No. 31 -RD- 1373 on behalf of two individuals, Tauni Simo and Maria Ramirez. Said petition sought an election among the same group of employees which is involved in the instant proceeding. A copy of the petition filed in Case No. 31-RD-1373 is attached hereto as Exhibit A. By letter of December 4, 1997, I administratively dismissed this petition as in my view, the showing of interest submitted in support of it was tainted by the numerous unfair labor practice allegations contained in the Complaint and Notice of Hearing which issued on November 6, 1997, in connection with related Case No. 31-CA-22699. The latter unfair labor practice charge was filed by the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, hereinafter referred to as the Union. At the time I administratively dismissed this petition, a hearing before an Administrative Law Judge with respect to the alleged unfair labor practice allegations was scheduled for March 9, 1998. A copy of my December 4, 1997 administrative dismissal letter is attached hereto as Exhibit B. Thereafter, the Petitioner filed a request for review of my administrative dismissal of Case No. 31-RD-1373 with the Board. By letter of March 3, 1998, the Board denied the request for review. A copy of the Board's March 3, 1998, letter is attached hereto as Exhibit C. Subsequent to the November 7, 1997, issuance of the

Complaint and Notice of Hearing in Case No. 31-CA-22699, two additional related unfair labor practice charges were filed in November, 1997, Case No. 31-CA-22991 filed by the Union, and Case No. 31-CA-23064 filed by the ILGWU-Employers Vacation, Health and Welfare Fund, hereinafter referred to as the Fund. Thereafter the three above mentioned unfair labor practice charges were consolidated for hearing before an Administrative Law Judge. No hearing was held before an Administrative Law Judge as on March 16, 1998, the Employer, the Fund, and Counsel for the General Counsel entered into a Settlement Stipulation, subject to the Board's approval, with respect to all outstanding complaint allegations. The Union refused to become a party to said Settlement Stipulation. Notwithstanding this fact, by its Decision and Order of September 16, 1998, the Board approved the Settlement Stipulation. A copy of the Board's September 16, 1998, Decision and Order is attached hereto as Exhibit D.

The petition in the instant matter, Case No. 31-RD-1393, was filed on August 26, 1998, and supported by employee signature petitions whereon the employee signers indicate they do not want the Union to represent them as their exclusive bargaining representative. All of the employee signatures were placed on the signature petitions on August 18, 1998. In my view, the validity, of a submitted showing of interest is determined by the circumstances and environment which exist at the time it is secured. As noted on Exhibit D, the unfair labor practice allegations at issue herein involve alleged serious violations of Section 8(a) (1) and (5) of the Act– i.e. withdrawal of recognition, refusal to bargain collectively with the Union, refusal to execute an agreed upon one year extension of the collective bargaining agreement hereinafter

referred to as the Agreement, and the refusal to make contributions on behalf of unit employees to the Fund. Additionally, the Board's Decision and Order (Exhibit D), requires that the Employer, inter alia, execute, give retroactive effect to, and abide by the terms of the Agreement, recognize the Union, bargain in good faith, and make all contractually required contributions on behalf of unit employees due and owing to the Fund, all in an effort to remedy the alleged violations of Section 8 (a) (1) and (5) of the Act. In the instant matter, with the exceptions noted infra, there is no evidence to disclose that any of the alleged unfair labor practices of the Complaints which issued in connection with the three unfair labor practice charges noted above, and were settled, with Board approval, by the Employer, the Fund and Counsel for the General Counsel were remedied prior to the gathering of the August 18, 1998, signature petitions submitted as the showing of interest in support of the above captioned petition. In this regard it is noted that our investigation has disclosed that the Agreement was not executed by the Employer until approximately November 9, 1998; the Employer continues to refrain from administering the union security and check-off clauses contained in the Agreement, a practice it commenced in about February, 1997; the Employer has failed to provide the Union with the names, addresses, telephone numbers and date of hire of unit employees, information it requested of the Employer in July, 1998; and the Employer continues to refrain from making contributions it owes on behalf of unit employees to the Fund. With respect to the latter, our investigation has disclosed that the Employer has made no trust fund contributions for work performed for non-signatory contractors, during the period March 1, 1997 through February 28, 1998, with an amount owing to the trust funds being approximately $50,000.00.

Based upon the above, it is my conclusion that the unremedied unfair labor practices noted in the Complaints, Settlement Stipulation, and Board Decision and Order, all related to Case Nos. 31-CA-22699, 22991, and 23064, are of such a nature and seriousness that they taint the showing of interest submitted in connection with the instant RD petition. Cf. Lee Lumber and Building Material Corp., 322 NLRB 175 (1996); Autoprod, Inc., 223 NLRB 773 (1976). In reaching this conclusion I have considered the fact that it may be argued that as the Board's Decision and Order did not issue until September 16, 1998, the Employer was under no obligation to commence remedying the alleged unfair labor practices until after said date. While perhaps technically correct, the serious alleged unfair labor practices remained unremedied during the entire relevant period of time, and their impact upon any showing of interest remained unchanged. I have also considered the argument that around April, 1998, the Employer remedied some of the alleged unfair labor practices by recognizing the Union and commencing to bargain with it. Assuming, arguendo, said bargaining which preceded the date on which the showing of interest was secured was both of a reasonable duration and in good faith, I conclude that it, as well as the recognition afforded the Union, do not outweigh the impact of the other serious alleged unfair labor practice violations which remain unremedied. In my view, failure of the Employer to execute the Agreement and to make benefit contributions are the type of unremedied alleged 8(a)(l) and (5) violations which have a tendency to either lead employees to become disenchanted with the Union as it appears the labor organization can do nothing for them and/or to undermine the employees' confidence in the Union by suggesting that any benefits will be a long time coming, if indeed they ever arrive. Cf. Lee

Lumber and Building Material Corp. supra, p. 177. Further, I note that the Employer, having executed the Settlement Stipulation on March 15, 1998, and apparently voluntarily complying with certain of its terms-recognition and bargaining- was free to voluntarily commence compliance with all its terms at any time. Finally, I recognize that the unfair labor practices at issue herein were resolved by a Settlement Stipulation approved by the Board without any adjudication by it that unfair labor practices have been committed, or an admission by the Employer that it engaged in conduct violative of the Act. Notwithstanding this, it is Board policy to treat such Settlement Stipulations involving unfair labor practices of the type at issue herein vis a vis the impact of such alleged unlawful conduct upon related decertification petitions, in the same manner as a Board adjudication and/or Employer admission of unlawful conduct. See Douglas-Randall, Inc., 320 NLRB 431 (1995).

Based upon the above, I conclude the showing of interest involved herein is tainted, and therefore the instant petition fails to raise a question concerning representation. Accordingly, the instant petition is hereby dismissed.[1]

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the National Labor Relations Board,

---

[1] Although not part of the reasons for my dismissal of the instant petition, it is noted that Counsel for the Employer has advised the Regional Office that the Employer has recently ceased operations and some of its equipment has already been sold. Thus, it appears the unit at issue herein no longer exists.

Washington. D.C., 20570. A copy of such must be served upon each of the other parties to the proceeding, including the undersigned. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal (8 copies) should be filed with the Board in Washington, D.C. 20570 by close of business December 28, 1998, except that the Board may, upon good cause shown, grant special permission for a longer period within which to file. The request for extension of time should be submitted to the Board in Washington, and a copy of any such request for extension of time should be submitted to me and to the other parties to this proceeding.

The appeal and the request for extension of time must include a statement that a copy has been served on me and on each of the other parties to this proceeding in the same or faster manner as that utilized in filing the request with the Board.

Very truly yours,

/s/_____

James J. McDermott
Regional Director

cc: Sorrento Coats, Inc., Attn.: Simeon Prophet, 125 East Rialto Avenue, San Bernardino, CA 92408

Keith Sharp, Esquire, Falk & Sharp, 660 S. Figueroa Street, Suite 1600, Los Angeles, CA 90017

Lawrence Zakson, Esquire, Reich, Adell, Crost & Cvitan, 501 Shatto Place, Suite 100, Los Angeles, CA 90020

NLRB Decision - 12/11/98

UNITE, Southwest District Council, 675 So. Parkview Street, 2nd Floor, Los Angeles, CA 90075

APPENDIX N

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENTS

AMENDMENT 1

USCS Const. Amend. 1 (2003)

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 5

USCS Const. Amend. 5 (2003)

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land

or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

TITLE 29. LABOR
CHAPTER 7. LABOR-MANAGEMENT RELATIONS
NATIONAL LABOR RELATIONS

29 U.S.C. § 157 (2003)

§ 157. Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

(July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.)

TITLE 29. LABOR
CHAPTER 7. LABOR-MANAGEMENT RELATIONS
NATIONAL LABOR RELATIONS

29 U.S.C. § 158 (2003)

§ 158. Unfair labor practices

* * *

(b) Unfair labor practices by labor organization.

It shall be an unfair labor practice for a labor organization or its agents--

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees

unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

(e) Enforceability of contract or agreement to boycott any other employer; exception. It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and section (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing

industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

TITLE 29. LABOR
CHAPTER 7. LABOR-MANAGEMENT RELATIONS
NATIONAL LABOR RELATIONS

29 U.S.C. § 159 (2003)

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer.

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * *

(c) Hearings on questions affecting commerce; rules and regulations.

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board–

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

* * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 U.S.C. § 2000e-2 (2003)

§ 2000e-2. Unlawful employment practices

* * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices.

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 54. Judgments; Costs

(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

APPENDIX O

Forwarded Message

Date: Sun, 8 Jun 2003 22:19:59-0400

From: csummers@law.upenn.edu

To: "LS Klibanow" <l_klibanow@yahoo.com>

Subject: Re: Simo v. UNITE: Comparison of Policies supporting broader definition of scope of activities germane to the role as exclusive bargaining rep for purposes of forcing dues contribution vs. scope of definition of representational activity for pu

Plain Text Attachment

Linda:

I should have responded much sooner, but the semester has been very hectic with teaching an overload. I have just finished grading exams, thank God.

I find the 9th Cir[c]uit's opinion so incomprehensible, that I have difficulty responding. Your idea of using [the] union [dues] obligation as an analogy [seems] to me, at least off the cuff, to be sound if the union can compel dues for an activity, then i[t] would seem that the union must necessarily be obligated to act fairly. I[t] might catch the court's

attention and be recognized [] as something which had not been considered and should be reheard.

What puzzles me about the court is how it could say that there was no representation function. The union was clearly involved in collective bargaining activity or actions designed to sup[port] col[l]ective bargaining activities. The union might argue that it was seeking to preserve its place in the market or strengthen its position in the market apt from he particular group [] of employe[e]s. True, it may not be part of a collective bargaining agreement, but it was a part of its collective bargain[i]ng strategy.

In some respects it was like a strike, use of economic power to achieve its objective. Dues paying workers are required to financi[a]lly support strikes. The union is the exclusive represent[a]tive for the purpose [] of exerting economic force; all [e]mployees are bound [b]y the no-[s]trike clause; strikes by group without the support of th[e] [] union are not engaged in protected activity and can be fired as [the] Supreme Court held [i]n Emporium Capwell.

The essence of the duty of fair representation is that the union can not use its position as exclusive repre[s]entative to work unfairness. Employees bound by the union's action are owed the duty of fair representation. It may owe that duty even to those it does not represent. See Railroad Trainmen v. Howard, 343 U.S. 768[.]

From another angle, if the uni[t] is not acting in its stat[ut]ory representation function, it would seem to lose its immunity under the anti-trust laws. The special provisions in

Taft-Hartley for the garment industry would not seem to give them immunity.

The essence of the case is that the union argued that it was attempting to carry out its bargaining policies [] as exclusive representative. How [t]he 9th Cir[cuit] did not see that is a [puzzle], If certiorari was granted to correct sheer stupidity in the circuits, you would have a sure case, But who knows what the Court which thinks it is overruled will act.

Clyde Summers

E-mails from Professor Clyde Summers

Forwarded Message

Date: Thu, 26 Jun 2003 11:23:26-0400

From: csummers@law.upenn.edu

To: "LS Klibanow" <l_klibanow@yahoo.com>

Subject: Re: Simo v. UNITE: Comparison of Policies supporting broader definition of scope of activities germane to the role as exclusive bargaining rep for purposes of forcing dues contribution vs. scope of definition of representational activity fo

Plain Text Attachment

Linda:

I am very sorry, but I have been away at a labor conference and out of contact with my e-mail. I have tried to think if I have ever published anything, or even a quote that would relate directly enough to this problem, but it is so unusual, and indeed outrageous, that I never addressed such a problem. Any judge, not bemused by fantasy arguments, should be able to see that the union is engaged in retaliation, not protecting members' rights. Something seems to be in the wind, for there or several o[t]her recent decisions which seem as incomprehensible. I wish I could be of help, but I do not know how.

Clyde Summers